TRADE UNION MANUALS—I

THE LAW RELATING TO TRADE UNIONS

BY THE SAME AUTHOR

TRADE UNIONISM
(METHUEN)

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TRADE UNION LAW
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The Law Relating to Trade Unions

Four Lectures delivered for the Council of Legal Education, Michaelmas Term, 1920

By

HENRY H. SLESSER

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WITH A FOREWORD BY THE RIGHT HON.
LORD JUSTICE ATKIN

1921

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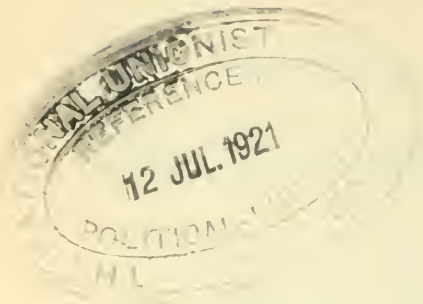

TO

EDWIN DELLER, LL.D.

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Foreword

By The Right Hon. LORD JUSTICE ATKIN

IT may surprise some persons, even some lawyers, to find that there is so much law relating to Trade Unions as is to be found in this book. The belief has been entertained that Trade Unions and their activities are outside the law; it will be dispelled by a glance at the contents. On the other hand, the remarkable fact that in a country where the rule of law has been predominant it has been considered advisable to make immune from civil liability for tortious acts the vast associations of capital and labour styled Trade Unions, equipped as they are with huge resources in money and men and possessing elaborate organizations conducted with consummate ability, renders it highly important to know the conditions of such immunity and the legal relations of Trade Unions both to their members and to the community at large. It was partly because of the important nature of the subject that the Council of Legal Education selected, for the first series of evening lectures to be delivered after the War, the subject of the Law Relating to Trade Unions, and asked the author to be the lecturer, and I am satisfied that the reader will find the subject treated in illuminating fashion. The history of the law, so necessary for present day interpretation, will be found to be very completely recorded. The exposition of the law and the discussion of practical difficulties seem to me acute and dispassionate. I can only wish for the book the success attained by the lectures.

J. R. Atkin.

FOUR LECTURES ON

The Law Relating to Trade Unions

(*delivered for the Council of Legal Education, Michaelmas Term*, 1920).

By HENRY H. SLESSER, Barrister-at-Law,
Lecturer in Industrial Law in the University of London.

LECTURE I.—HISTORICAL.

§ 1.—Introductory.

THERE are certain departments of law, of such ancient origin, so closely interwoven with the social and economic development of the country, that it is scarcely possible to understand them at all fully without considering their historic growth. The most obvious example is that which deals with the tenure of land, but the antique origin of that part of the law which we have under consideration is no less apparent.

We read of lists of workmen's associations in Rome and Italy as long ago as the year 62 B.C., and already at that time there was a party in the Senate who were attempting to introduce laws to make them illegal.[1] Thence onwards, the supposed con-

[1] Ferrero, *Greatness and Decline of Rome*, Vol. II.

flicting interests of the State and industrial organizations within it have produced in nearly every European country a plentiful growth of legislation and its necessary consequence, litigation.

The jealousy of King and Lord to the mediæval craft guild was assuaged by the granting of legitimizing charters by Authority, but, in so far as these craft guilds were, for the most part, guilds of employers, the real problem as to the legality of combination among workmen journeymen remained unsolved. Thus, in ordinances of the White Tawyers of London, 1346,[1] it is ordained "that no stranger shall work in the said trade, or keep house in the City, if he be not an apprentice, or a man admitted to the franchise of the said City."

It is true that, in the earlier Middle Ages, the great bulk of what we should now call the working population were in a state of villeinage, but, with the rapid growth of trade, the emancipations of Edward III, and the devastating effects of the Black Death, the power and importance of the surviving free workmen who were not attached to a chartered guild increased exceedingly.

In this way only can we explain the feverish legislative activity of the fourteenth century with regard to economic matters. By the year 1348 the struggle between the new free labourer and his employer was at its height; the disorganization of labour was complete, for the mortality caused by the Black Death had been enormous, and the labourers, finding themselves masters of the

[1] *Guildhall Letter Book*, F. 126.

situation, both in combination and otherwise, insistently demanded large increases of wages.

With these facts in view we approach the first general case of labour legislation, the Statutes of Artificers and Labourers. They began with royal Ordinances under Edward III. The Ordinance of Labourers[1] is addressed to the Sheriff of Kent, and recites that "Because a great part of the people, and especially of the workmen and servants, has now died in this plague, some, seeing the necessity of laws and the scarcity of servants, will not serve unless they receive excessive wages, and others preferring to beg in idleness rather than to seek their livelihood by labour. We, by the unanimous counsel of our prelates and nobles, have thought fit to ordain that every man and woman of our Realm (exceptions follow as in a later statute) shall be bound to serve and receive wages as in the twentieth year of our reign or in the five or six years last preceding" (in certain trades twenty years preceding). A similar ordinance was issued to the clergy, and, later, found expression in the first Statute of Labourers. Accordingly, in 1351, we read of presentments before the Justices under that statute.[2] In the Hundred of Chelmsford it is recited that "the jurors present that Arnulph le Heirde, servant of John Dodebrook, withdrew from his service before the end of his term"; another man takes double what he used to take before the statute, and other cases are mentioned. The Exchequer Rolls estreats for 1351 state the fines for breaches of the statute. The Close Roll of

[1] Close Roll, 23 Edward III (1349). [2] Assize Roll, M.M. 1, 81.

Edward III contains a writ to enforce the payment of these fines to the King's Collectors.

Finchden J., in the fortieth of Edward III, Michaelmas term, said: "The Statute was made to advantage the Lords that they should not lack servants." Dealing with the principal Act of 1350, he decided that the statute applied to hired servants only and not to tenants. Persons who came within the statute were compelled to work at a reasonable rate, which rate, by a subsequent Act of Richard II,[1] was to be fixed by the Justices instead of by reference to the earlier wages paid. It provided that every man or woman, bond or free, able in body and within the age of threescore years, not having his own whereof he might live, nor land of his own about which he might occupy himself, and not serving any other, should be bound to serve the employer who should require him to do so. As has been said, in the earlier statute no provision was originally made for the variation of wages, but servants were required to take the same wages that they were taking the year before the plague (1347), and anyone who asked for more or refused to serve was to be imprisoned and pay double as a penalty. This was now altered. The general provisions of the Statutes of Artificers and Labourers were thus re-enacted by 13, Richard II, with variable maximum wages.

By a subsequent Statute runaway labourers were to be outlawed and branded with an "F" for falsity; towns harbouring them were to be fined ten pounds.[2]

[1] 13 Richard II, c. 8 (1388). [2] 21 Richard II, c. 12.

Despite constant fresh legislation after every recurrence of the plague, the general opinion is that the statutes were a failure, as the State was not strong enough to enforce its own decisions. In 1360 the combination of workmen, particularly masons and carpenters, is struck at by the statute,[1] which declares null and void all alliances and covines of those trades.

This Act also appears to have been unsuccessful, for in 1425, "yearly congregations and confederacies" made by masons in their general "chapiters" assembled were forbidden.[2]

Meanwhile the guilds, protected by their Charters, were not less hostile to the labourer. The blacksmiths of London made ordinances in 1344 that "if any stranger come to London to have service in the craft, he shall be received in the craft to serve two weeks, and after that to make his covenant for three years, and to have for his salary 40s. a year, and shall do nothing pertaining to the craft, without the counsel of the Warden; and that no servant of the craft shall sustain or succour a new man that cometh new to the town to have service but in the form aforesaid."

The Shearmen or Cloth-workers, in 1452, ordained that "no man take an apprentice into the craft but he be free born and clean of body and of limbs, and not disfigured in any manner; and that if any man of the craft, or his apprentice, shear any cloth but it is truly wet he shall pay an arbitrary fine; and if any man take any chaffer of any Lom-

[1] 34 Edward III, c. 10, see also the earlier 33 Edward I, st. 1.
[2] 3 Henry VI, c. 1.

bard or stranger, or receive any foreign man without the license of the Wardens, he shall pay a fine."

These various rules were certified by the Commissary of the Bishop of London, with the view of making them binding upon the members, who could be sued in the Bishop's Court for breach of faith if they did not fulfil their undertaking to obey them. This ingenious method of using the ecclesiastical courts to enforce civil obligation was not looked upon with favour by the Civil Courts, and, indeed, had been prohibited in 1164, and again in 1220 and later in 1481. The guilds also declare that no body shall take "for working in the said trades more than they were wont heretofore." In 1467 the corporation of Worcester orders the tilers there to "set no Parliament among them."

The Ordinances of the Dyers of Bristol[1] ordained that "forasmuch as divers folks, not being servants of the mistery have taken upon them to dye cloths, which by reason of the latters knowledge are greatly impaired of their colours and many other defects to the shame of the whole craft aforesaid, whereby the masters of the said craft go vagrant for lack of work therefore no manner of man of the same craft do dye any cloth or wool unless it be presented by the said master that he is learned in the trade"; the corporation endorsed the ordinance.

In 1494, the exclusiveness of the craft guild caused some sufferers therefrom to affix to the

[1] 13 Henry IV, Patent Roll, 1407.

church door at Coventry, the following protest:

"Be it known and understood
This city should be free and now is bond.
Dame Good Eve (*Godiva*) made it free
And now there be customs for woolen and drapery—
Also it is made that no pretence shall be
But thirteen pennies pay shall he.
That act did Robert Green (*the mayor*)
Wherefore he had many a curse I ween."

These verses were not in vain. By Statute, 28 Hen. VIII, chap. 5, exactions on apprentices were forbidden.

The Statutes of Labourers were several times re-enacted under the Lancastrian sovereigns and the powers of the Justices to regulate wages often increased, notably in 1415 and 1424. The Court Letter-book of Coventry for 1529 contains a record of fixing of wages by the Justices.

In 1512,[1] a cynical statute declares that "no penalties for giving of wages under the statute (12 Rich. II) or any other statute shall be imposed on the master or giver of wages."

The general position, therefore, at the time of the Reformation was this: combinations of employers or special skilled workers possessed of charters were lawful and, within their bye-laws, had considerable powers of industrial regulation; outside this charmed circle, however, combinations in restraint of trade or for wage regulation were usually unlawful, and, by the time of Edward VI,

[1] 4 Henry VIII, c. 5.

all combination of workmen or labourers "not to make or do their work but at a certain price or rate" were forbidden; the earlier Acts had applied to certain trades only. A third conviction under this Statute involved the pillory and the loss of an ear (2 and 3 Edw. VI, c. 15).

The era of legislative activity inaugurated by Elizabeth and her advisers found expression in the industrial field in the Artificers, Labourers and Apprentices Act[1] passed in 1562, commonly called the Statute of Apprentices. The Act is entitled, "An Act containing diverse orders for artificers, labourers, servants of husbandry and apprentices"; most of the earlier Acts were repealed, but persons able to do work and not possessed of means of employment are bound to work on demand. The hours of work were fixed and powers given to the Justices in their next session within six weeks after Easter to fix the wages to be paid. Apprenticeship is dealt with at length, and it is provided that no one is "to set up use or exercise any craft, mystery or occupation now used in England or Wales unless he is serving, or has served an apprenticeship of seven years." The statute remained long in force and was not finally repealed until 1875.

An Act of James I[2] recites that the Act of Elizabeth has not "according to the due meaning thereof been duly put into execution, whereby the rates of wages have not been fixed," and provides that it shall apply to all workers whatsoever whether by the day, week, or year, and fresh fines

[1] 5 Elizabeth, c. 4. [2] 1 Jac., 1, c. 6.

are imposed upon those who disobey the statute. On the whole there was but little opposition to this Act, the country was economically prosperous and the number of persons directly affected by it was, for a long time, comparatively small; but, towards the end of Elizabeth's reign the purchasing power of money, owing, perhaps, to the increase of currency from America, had fallen away and demands had been made to the Justices to increase wages.

It is interesting to note that, on the average, the Justices fixed a day's work at nine and a half hours in the summer and eight and a half in the winter. For the first time we read of Assessors, for the Justices may now consult "such discreet and grave persons as they shall think fit in every trade." It should be observed that the "reasonable wages" which the Justices were to fix were not what is now called a "living wage," but a rate which appeared reasonable and proper to the labourers' condition in the eyes of the Justices.

If legislation be an indication of popular need, we must assume that the discontents of the seventeenth century in regard to political and religious matters did not extend to industrial ones; throughout the period the Justices continued to fix the scales. At times the Justices even took it upon themselves not only to fix wages, but also to send people to work. In 1655 the Justices note that "young people will not go abroad to service without they may have excessive wages, but will rather work at home at their own hands, and therefore ordain that, unless their parents will keep them,

they shall, with all convenient speed, betake themselves to service for the wages aforesaid already proclaimed."[1] The Rebuilding of the City of London Act (18 and 19 Chas. 2 c. 8) authorized two or more judges of the King's Bench to fix wages in the building industry for men engaged in rebuilding London, and provided also that "all artificers who are not freemen of the City might have and enjoy the same liberty of working" in building the city as the guildsmen for seven years from 1667. Macaulay, in his *History of England*, describes the Justices of Warwickshire, Suffolk, and Devonshire adjusting wages, but in 1661 the grand jury of Warwickshire have to request them to do so,[2] and, with the coming of the eighteenth century, there is to be found a change.

In the early years of the eighteenth century complaints again begin to be made in Parliament from time to time of unlawful associations of wage earners; an example is a petition of master tailors against combination in 1721 as follows:

"This combination of journeymen tailors is, and may be, tended with many evil consequences, inasmuch as the public is deprived of the benefit of the labour of a considerable number of the subjects of this kingdom. The families of several of these journeymen thereby impoverished, and likely to become a charge and burden to the public and the very persons who are themselves under this unlawful combination, choosing rather to live in idleness than to work at their usual rates and hours will not only become useless and burden-

[1] Hist. MSS. Com. 1, 132. [2] Hist. Roll, p. 322.

some, but also very dangerous to the public, and are of very ill example to journeymen in all other trades. As is seen in the journeymen curriers, smiths, farriers, sailmakers, coachmakers and artificers of divers other crafts and mysteries, who have actually entered into confederacies of the like nature and the journeymen carpenters, bricklayers and joiners have taken some steps for that purpose and only wait to see the event of others."

The case of R. *v.* The Journeymen Tailors of Cambridge,[1] is a prosecution for conspiracy with others to raise wages, based in part upon the statute, in part upon the common law. We shall discuss this case further in a later lecture. I only cite it here as an example of the beginning of renewed hostility to industrial combination. As the century advanced, moreover, the fixing of wages by the Justices fell into disuse. Though there is record of the Warwickshire Justices fixing rates as late as 1738, the assessments were becoming obsolete, and, gradually, we find the workmen banding together to petition Parliament to compel the Justices to enforce the rates ; thus in 1753, the Spitalfields Silk Weavers obtained an Act[2] which ordered the Justices to fix wages under the statute of apprentices in their trade. A union was then in existence, for there is to be seen in the Record Office[3] a letter of the same year from Sir John Fielding, the author and magistrate, to the Earl of Suffolk, stating that he had received the Spitalfields Act and that the wages had been settled by him and the Justices to the entire satisfaction

[1] (1721) 8 Mod. Rep. 10. [2] 13 George III, c. 68. [3] H.O 86, 26.

of the masters and journeymen weavers who appeared there on behalf of their respective bodies.

Unions sprang up, principally for the purpose of enforcing the statute among the tailors, woolworkers and others, and we have to notice an Act of 1756, ratifying a scheme for piece work wages for clothiers in the Western Counties. Petitions flowed in from workers' combinations all over the country; we read of an agricultural labourers' petition in 1795,[1] but opinion was fast setting in in favour of "laisser faire" and the free higgling of the wage market. There followed a change of object in the methods of the workmen's unions, away from the device of Parliamentary petition, towards the more drastic means of the strike. This in its turn produced more Parliamentary activity. Although certain wage regulation by statute had been ordered, in 1725, 1749, and 1755,[2] the great bulk of workmen could no longer rely upon the protection of the Justices.

In 1796 a proclamation against combinations among woolcombers was issued. Specific Acts against combinations in particular trades constantly increased, and finally, in 1799, a general Act was passed,[3] inspired doubtless by fear of the French Revolution, for the suppression of all combinations by workmen for the purpose of raising wages. In 1800 this Act was amended by the addition of provisions dealing with arbitration.[4]

[1] *Annals of Agriculture*, Vol. XXV, p. 503.
[2] *i.e.*, 12 Geo. I, c. 35; 22 Geo. II, c. 27; 29 Geo. II, c. 33. The regulation was coupled with a prohibition against combination. [3] 39 George III, c. 86. [4] 40 George III, c. 60.

These Combination Acts, as they were called, declared that all contracts entered into for obtaining an advance of wages, or shortening hours of work, or for preventing persons employing whomsoever "they think proper, or controlling any person in carrying on his business" were void, and any workman entering into such a contract or entering into a combination for these objects, or inducing any other person to do so, or leave their work, or to maintain men on strike, is made liable to imprisonment for three months without hard labour or two months with it.

There does not appear to have been any Parliamentary debate on the former of these Acts, but there seems to be little doubt that, apart from this and other statutes, at common law it was not an actionable conspiracy to combine to raise wages. I shall discuss the isolated dicta to the contrary hereafter.

Soon after the passing of this Act prosecutions were instituted against offenders under the Act. The trade unionists, for the most part, still desired to see the Statute of Apprentices modernized and extended to new industries; the petition of the Calico Printers (Commons' Journal for 1804) is an example of this, and of the Weavers (1813), while the employers, who desired to obtain cheap labour and objected to the restraints of the wage fixing and the old seven years' apprenticeship, sought for its repeal. Towards the end of the century free bargaining between capitalist and workmen had become well nigh universal, and, if we may anticipate, in the case of R. *v.* The Kent

Justices, 1811,[1] it was held, first, that the fixing of wages by Justices under the old statutes was discretionary and not a duty, and, secondly, that the Act of Apprentices only applied to industries in existence in 1563. As a result, in 1813, the provisions of the Statute of Apprentices as to wage fixing were repealed, after a long debate.[2]

It was under these circumstances that the injustice of prohibiting combinations became acute. Until the Statute of Apprentices was repealed or became inoperative, it was very arguable that the prohibition of combinations of workmen was a corollary of the State determining conditions of labour, but, as we have seen, from 1800 onwards, until the repeal of the Combination Acts in 1824, the State protection of the workmen had ceased while they were prevented from combining in their own defence. To put the matter in the words of Lord Jeffrey, at a dinner to Joseph Hume at the time of the repeal in 1825, "a single master was at liberty at any time to turn off the whole of his workmen at once—a hundred or a thousand in number—if they would not accept of the wages he chose to offer, but it was made an offence for the whole of the workmen to leave that master at once if he refused to give the wages they chose to require."

The Combination Act, in theory, applied to combinations of employers as well as workmen, but, although the employers formed unions to raise prices or regulate wages, such as the Sheffield Mer-

[1] 14 East, 395.
[2] *Parl. Debates*, new series, Vol. 25, pp. 1120-131, etc.

cantile Manufacturing Union of 1814, there is no case in the records of any prosecution or conviction.

Passing then to the specific prosecutions of workmen, we find a large number of the cases reported in the newspapers of that time, most of which do not find their way into the reports. We have to notice in particular the following cases: In 1798, the prosecution of five printers at the Old Bailey for combination under a special Act; the men were members of a Trade Friendly Society, and, as was said by the prosecution, "it was called a Friendly Society, but, by means of some wicked men among them, this Society degenerated into a most abominable meeting for the purpose of conspiracy." Their offence was that those of the trade who did not join their society were summoned and were told that, unless they conformed to the practice of the journeymen, they would not be employed: presumably the others would have struck.[1] A sentence of two years' imprisonment was imposed by the Recorder. In 1799, in R. *v.* Hammond[2] and in R. *v.* Salter (1809),[3] persons were convicted for combining and threatening to strike in order to raise wages.

In 1810 the Journeymen Printers were sentenced by the Common Sergeant of London under the 1800 Statute.[4] In 1824 there was a prosecution arising out of the Scottish Weavers' strike which, curiously enough, was called to enforce a rate fixed by the Justices. Sentences vary-

[1] From a pamphlet in Professor Foxwell's library.
[2] 2 Esp. 719. [3] 5 Esp. [4] *Times*, Nov. 9th, 1810.

ing from four to eighteen months were imposed.[1] Other cases which may be mentioned are the seven scissor grinders, for combining to enforce the customary rates at Sheffield in 1816 and those of the Bolton Mill Workers (1818); Coachmakers and Calico Workers in 1817 to 1819, the former being reported in the *Times*, *sub nomine* R. *v.* Connell, July 10th, and the latter, R. *v.* Ferguson and Edge.[2] There are many other cases, raising no particular points of law, reported in contemporary documents.

We have to observe that, during this period, legislation was passed making Friendly Societies undoubtedly lawful, and there is no doubt that many organizations at this time, which were really trade unions, sought to cover their trade union practices under the guise of a Friendly Society. As early as 1794, this was suggested by Parliament.[3] Examples are to be found in the Friendly Society of Ironfounders, the Benevolent Society of Coachmakers and the old Curriers Society, which has recently been before the courts.[4] It is a curious instance of the futility of unpopular legislation that we find a large number of societies, avowedly trade union, being instituted during this period, such as the compositors, 1801, the cabinetmakers, and several branches of the engineering trade, *circa* 1816 to 1824; masons, cuttlers and hatters, coalminers, shoemakers, and weavers, and others.

Apart from the Combination Acts there are two statutes still unrepealed which make it unlawful

[1] *A Report of Committee on Artisans and Machinery*, 1824, p. 62.
[2] 2 S.T. 489. [3] See Report, *H.C. Journals*, pp. 323, 794.
[4] White *v.* Riley [1921] 1 Ch. 1.

for the delegates of one society to appoint delegates to meet another society in order to persuade the latter to join the former: the Unlawful Societies Act,[1] and the Seditious Meetings Act,[2] which deals with societies bound together by oaths. Both these statutes have been recently before the courts, but the late Mr. Justice Neville has decided that though these statutes cannot be said to be obsolete, Parliament has dealt with trade unions subsequently in such a way that they can no longer be said to render trade unions illegal.[3]

§ 2.—Repeal of Combination Acts.

During the operation of the Combination Acts labour disturbances had become very acute. The Luddite Riots of 1811 produced serious violence in many counties and many machines were broken; in 1812 there were forty thousand cotton weavers on strike and in 1814 there were many riots. Seven years after that time, however, industry began to improve, and, in 1824, Joseph Hume and Francis Place managed to persuade the House of Commons to appoint a committee to inquire into the Combination Laws. This committee was most artfully controlled by Hume and, while its scope was represented to the Government as being concerned only with the encouragement of machine production, in fact, the members were soon induced to consider the repeal of the Combination Acts. The resolutions of the committee, unanimously favour-

[1] (1799) 39 George III, c. 19. [2] (1817) 57 George III, c. 19.
[3] See Luby *v.* The Warwickshire Miners' Association, [1912] 2 Ch. 371; Parr *v.* Lancashire and Cheshire Miners' Federation, [1913], 1 Ch. 366.

ing such repeal, were rapidly adopted by Parliament in the Combination of Workmen Act of 1824.[1] This statute repeals all the Acts restraining combinations already referred to, and proceeds, in terms, to enact that persons who shall enter into any combination to obtain an advance or fix a rate of wages or lessen or alter the hours of working, or induce another to depart from his service before the end of the time for which he is hired or to refuse to enter into work or employment or to regulate the mode of carrying on any trade, shall not therefore be liable to any prosecution for conspiracy or other criminal punishment under the common law or statute law.

The effects of this Act were immediately felt, trade unions came into being in large numbers and many strikes occurred or were threatened. As a consequence, in 1825, the legislature, by statute,[2] amended the first Combination Repeal Act, after another committee had considered the matter. By this second Act, while collective bargaining and combination remained lawful, specific offences of "threats, intimidation, molestation and obstruction" were created.

The growth of trade unions continued, and ambitious schemes for vast National Associations were again set on foot.[3] A committee was appointed and proposals were made for restrictive legislation against trade unions, and, although no legislation resulted, new doctrines of illegality arose, centering around the notion of molestation as defined in the

[1] 5 George IV, c. 95. [2] 6 George IV, c 129.
[3] See *Trade Unionism*, 2nd Ed., Slesser (Methuen), Ch. 2.

Act of 1825 rather than that of combination. Thus in 1832 in the case of R. *v.* Bykerdyke,[1] it was held to be a criminal combination to "molest" within the meaning of the 1825 Act, for trade unionists to write to an employer to say that a strike would take place; moreover the Acts of 1797 and 1819 against unlawful oaths, already mentioned, were put into force. In one case, in 1802, Lord Ellenborough held that an oath administered by journeymen shearmen came within the earlier Act,[2] and the oathbound Grand National Trade Union was affected in the case of R. *v.* Lovelace and others, the notorious case of the six Dorchester Labourers, charged with administering unlawful oaths[3] which came before Baron Williams. This was in 1834. In 1835 four workmen were convicted of "intimidation" on the evidence of employers that they had advanced their prices in consequence of the interference of the defendants, who had acted as plenipotentiaries for the men—no threat in terms being proved.

The statute law of master and servant was still unrepealed. To leave work unfinished was still a criminal offence, and the statute also made it possible to prosecute for industrial combination as in the case of the seventeen tanners at Bermondsey.[4] Picketing was also considered to be an intimidation, even when it was peaceful.[5] In 1847, however, in the case of R. *v.* Selsby,[6] we find Baron Rolfe confining intimidation under the 1825 Act to threats of personal violence, and, at page 498,

[1] 1 Moo. and Rob., 170. [2] R. *v.* Marks, 3 East. 157. [3] 6 C. and P. 596. [4] *Times*, 1834, Feb. 27th. [5] Southwark Shoemakers' case, 1832. [6] 5 Cox C.C. 495.

speaking of persuasion, he says, "it is doubtless lawful for people to agree among themselves not to work upon certain terms; that being so, I am not aware of any illegality in their peacefully trying to persuade others to adopt the same view." Under the 1825 Act the question of threats, intimidation, molestation or obstruction were for the jury and, in Selsby's case, it was nevertheless decided by the jury that to say to workmen "you had better not go there, you will repent it" was an unlawful threat. In 1851 there were several prosecutions, namely, the cases of R. *v.* Hewitt,[1] in which it was held that to support a strike to procure the dismissal of a member who refused to pay a fine was unlawful; R. *v.* Duffield,[2] a case in which a trade union secretary persuaded employees not to enter into employment; held to be a "threat" but no "intimidation," that is a threat to the employer; though in that case Erle J. affirmed the right to strike so long as no efforts were made to induce others to join, and defined a threat as threatening a man either with personal injuries or with the loss of comfort in any way.[3] It is to be noticed that this definition of a threat agrees closely with the view of Mr. Justice Astbury in the recent case of Valentine *v.* Hyde.[4] In the important case of R. *v.* Rowlands, decided the same year as Duffield's case, Erle J.[5] held that workmen may combine to raise wages, where the purpose is to obtain a benefit for themselves, but that to combine to force an employer to agree to wages is unlawful,

[1] 5 Cox C.C. 162. [2] *Ibid.* 404. [3] Page 432. [4] [1919] 2 Ch. 129. [5] 17 Q.B. 671.

where unlawful means, such as intimidation or threats are used, and, apparently, a threat to call men out is such an unlawful threat, as it is to say to men "if you work there we shall strike against you, or to follow a workman home."[1]

Despite these many prosecutions, strikes were plentiful in the middle of the last century, and the year 1850 saw the institution of the Amalgamated Society of Engineers, among many other trade unions; again House of Commons Committees were instituted in 1856 and 1859, and, in the latter year, there was passed the Molestation of Workmen Act,[2] which redefined the terms "molestation and obstruction" in the 1825 Act, which in the past had substantially been treated as questions of fact, as follows, "no workman or other person, whether actually in employment or not, shall, by reason merely of his entering into an agreement with any workmen or persons for the purpose of fixing remuneration at which they should work or by reason merely of endeavouring peaceably and in a reasonable manner and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work in order to obtain the rate of wages or the altered hours of labour so fixed upon, shall be deemed or taken to be guilty of molestation or obstruction within the meaning of the 1825 Act." There was a proviso that nothing therein contained should authorize any workman to break any contract or attempt to induce any other person to do so.

This proviso, no doubt, had reference to the

[1] See also R. *v.* Perham, 1859, 5 H. and N. 30. [2] 22 Vict., c. 34.

still subsisting Master and Servants Acts, under which an employer who broke a contract with a workman could be sued for damages, whereas the workman could be imprisoned for three months. Imprisonment, moreover, did not of itself discharge the workman's debt.[1] It was not until 1867 that these criminal provisions were repealed.[2]

The first judicial interpretation of the 1859 Act is to be found in the case of Walsby *v.* Anley,[3] in which it was held, under facts similar to those in the recent case of White *v.* Riley, in the Court of Appeal, namely, a letter sent to an employer of a resolution of men threatening to strike unless a certain man was discharged, that such an act still constituted a criminal threat and molestation. The views of the two learned Judges, Lord Justice Cockburn and Mr. Justice Crompton, are worthy of consideration. The former distinguished, as did Mr. Justice Astbury lately, in Valentine *v.* Hyde, between a combination of men who gave the employer the alternative of dismissing them or the objected persons, with a combination who really were masters of the situation and so by threatening one employer with loss could force his hand; while Mr. Justice Crompton thought it was criminal to combine to compel the discharge of a fellow workman by the threat of a strike. In O'Neil *v.* Longman,[4] it was held to be a "molestation" to threaten to turn a man out of a union and send his name round the country.

[1] Unwin *v.* Clark, 1 Q.B.D. 417.
[2] 30 and 31 Vict., c. 141.
[3] (1861) 3 E. and E. 516.
[4] (1863) 4 B. and S. 376.

On the other hand, to discuss with an employer the settlement of a dispute without handing him a resolution to strike was not an intimidation.[1] Nor even where a resolution to strike had been carried was it intimidation to give it to the employer at his request.[2]

In Shelbourne *v.* Oliver,[3] Walsby *v.* Anley was followed, and it was held to be an offence to threaten to call out the men unless an obnoxious person was discharged; so also in R. *v.* Druitt,[4] where pickets were placed who "insulted and followed persons," this was held to be intimidation, molestation and obstruction, though in that case Baron Bramwell told the jury that a picket who did not do anything more than peaceful persuasion might be innocent. Skinner *v.* Kitch[5] was a case similar to Walsby *v.* Anley and Shelbourne *v.* Oliver, and had a similar result, while in R. *v.* Sheppard,[6] peaceful persuasion being only proved, the case came within Baron Bramwell's observations in R. *v.* Hewitt, and resulted in an acquittal.

In R. *v.* Sheridan, Lush J. is reported in the *Leeds Mercury*, August 13th, 1868, to have said that there was nothing criminal in a combination to enforce a strike without intimidation.

§ 3.—RESTRAINT OF TRADE.

The normal activities of industrial organizations tend to produce that legal position generally

[1] O'Neil *v.* Kruger (1863); 4 B. and S. 389., [2] Wood *v.* Bowron, 2 Q.B. 21. [3] (1866) 13 L.T. 630. [4] (1867) 10 Cox C.C. 592. [5] (1867) 2 2 Q.B.D. 393. [6] (1869) 11 Cox C.C. 325.

known as Restraint of Trade. We have to notice in the first place, the existence, from very early times, in corporations or guilds of traders, of a right given to them by a sovereign authority, by Royal Charter, or otherwise, to restrict trade in their area or occupation. Thus Henry II, by Charter, granted to the guild merchant of Oxford that no one outside the guild should do any trading in the city or suburbs; to the Nottingham Guild control of the cloth dying trade is given for ten leagues around the city. It is to be noticed that, without such Royal Charter, the organization would be considered by the mediæval lawyer to be adulterine and so liable to be dissolved. We may observe that, by the Municipal Corporations Act of 1835, such restraint of trade by custom was dissolved outside the City of London.

It is not necessary here to discuss at all fully the general development of the doctrine of restraint of trade. The instance of Dyers case[1] is often cited as early example of the recognition of the doctrine, but the case is complicated by elements of fraud and compulsion and is for that reason unsatisfactory. Nor are the mediæval statutes forbidding Forstalling and Regrating much in point. Coke certainly developed the doctrine of restraint of trade, as in the Ipswich tailors' case,[2] in which appears the phrase "the common law does abhor all monopolies," which, together with the case of the Exeter Tailors,[3] and the Gun-makers' Society *v.* Fell,[4] go near to decide, not only that a

[1] (1414) Y.B. Henry V, F. 5, p. 26. [2] (1614) 11 Co. Rep. 53a.
[3] (1684) 2 Shower 345. [4] (1742) Willis 384.

general restraint is void, but also that such restraint might taint the organization which was based upon it.

In Jones *v.* North,[1] Vice-Chancellor Bacon said, "there is nothing illegal in the owners of commodities agreeing that they will sell, as between themselves at a certain price," but, as between the members, it might have been unenforceable. Thus also in the Mogul case, Lord Hannen said,[2] "I think the agreement between the defendants to act in combination illegal in the sense that it was void and could not have been enforced," so also in Urmston *v.* Whitelegg.[3]

A trade union or similar organization, therefore, might, and still may, at common law, be unlawful according as its objects or rules do or do not violate the general principles as to restraint of trade.[4]

It is important that a clear distinction should be drawn in discussing the legality of trade unions at common law, between illegalities which may arise in connection with notions of conspiracy and those arising from the doctrine of restraint of trade alone.

Nothing resembling Conspiracy, in its modern sense, was known to the law before the seventeenth century, says the late Mr. Justice Wright in his invaluable *Law of Criminal Conspiracies*. In the Poulterers' case,[5] the doctrine was established

[1] L.R. 19 E.9. 426. [2] [1892], A.C. 25, at page 58. [3] 63 L.T. 455.
[4] See Gozney *v.* Bristol Trade and Provident Society [1910], 1. Ch.D. 163, per Cozens-Hardy M.R. at p. 915. Russell *v.* Amalgamated Society of Carpenters and Joiners [1912], A.C. 421, per Lord Shaw at pp. 432-3, and per Lord Robson at p. 439, etc.
[5] 9 Co. Rep. 55.

that the gist of the crime was the intent, and, by gradual stages, the crime was extended to a conspiracy which, though planned, had not been carried out, and thus the agreement or confederacy for the commission of a conspiracy became itself an act of conspiracy.

It appears that this doctrine originated in the Star Chamber and, after the fall of that Court, became absorbed into the common law. Thence we arrive at the statement in Hawkins' *Pleas of the Crown* (1717) that a combination to do an act unlawful, though not criminal, might nevertheless itself be criminal.

The multiplicity of statutes forbidding combination certainly suggests a deficiency in the machinery of the common law to deal with the matter. There is an early ordinance of Edw. I, 1305, and an Act of Edward I, against those who confeder or bind themselves by oath, etc., to obtain advances of wages; many other similar statutes exist, such as Edw. 3, c. 15; 3 Hen. 6 c. 6; 7 Geo. 1, etc. By the time of the General Combination Act of 1799, there were nearly a score, all passed apparently, to forbid that which the common law was powerless to prevent.

The fact that a combination, merely in restraint of trade, is nevertheless not an illegal conspiracy at common law has already been suggested—it is true that we find in Hawkins' *Pleas of the Crown*, p. 446, the statement that "all confederacies whatsoever wrongly to prejudice a third person are highly criminal at common law, as were diverse persons confederate together by indirect means to

impoverish a third person," and that this dictum was adopted by Grose J. in R. *v.* Mawby.[1]

The case of the Tailors of Cambridge often cited in support of this view was probably based in part at least upon the statutes,[2] but, apart from statute, the erroneous notion of the criminal nature of a combination of workmen at common law finds expression as late as 1853 in the case of R. *v.* Rowlands,[3] in which it was said to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another, and is finally heard of in the judgment of Crompton J. in Hilton *v.* Eckersley, 1856,[4] where he held, as against Lord Campbell, that a bond between employers not to raise wages might be a criminal conspiracy.

Since that time we are only concerned with the civil aspect of the matter; as to how far a combination in restraint of trade is an illegal association at common law. In the middle ages, the notion that wages and prices should be fixed by free competition would have been thought a monstrous absurdity.[5] The Statute of James I against monopolies contains a reservation in favour of corporations, companies or fellowships of any art, occupation or mystery.[6] In Hobbs *v.* Young,[7] Holt J. dissents from Coke's view that companies that went beyond the Elizabethan statute were necessarily unlawful as in restraint of trade.[8] So

[1] 1796, 6 T.R. 619. [2] *i.e.* 8 Edward VI, c. 15 and 1 Jac. 1, c. 6. [3] 5 Cox C.C. 466. [4] 6 E. and B. 47. [5] See Smiths' *Leading Cases* I, 406 *et seq.* [6] 21 Jac. I, c. 3, sec. 9. [7] Carthew 162. [8] See Norris *v.* Stapps, Hobart's Reports 293, in which that view is taken.

also in Nightingale *v.* Bridges,[1] and East India Co. *v.* Sandys,[2] it was held that, "a monopoly is no immoral act which, if it happens to be to the advantage of the public, as this trade is, ceases to be against the prohibitory part of the law."

Nevertheless, even before the case of Mitchell *v.* Reynolds, such organizations as restrained labour would probably not be held to be for the advantage of the public, and the nineteenth century view is clearly shown in the case of Hilton *v.* Eckersley, already mentioned (where the legality of a group of employers agreeing by bond to fix wages by a majority was under discussion); Erle J. thought the bond and association good, but, on appeal, the Court (Lord Campbell and Crompton J.) thought it unenforceable; the former distinguishing between the civil illegality arising from the restraint, which he held to exist, while deciding against the association being a conspiracy, while Crompton J. thought it amounted to a criminal conspiracy. The Court of Exchequer Chamber, in a judgment by Alderson B., also held the combination to be civilly unlawful, but expressed no opinion as to its criminal aspect as a conspiracy. Finally, in R. *v.* Stainer,[3] Keeting J. definitely held that an association, merely in restraint of trade, was not thereby made a criminal combination.

There remains, therefore, only to be considered the effect of civil unenforceability upon a trade union prior to 1871. In Hornby *v.* Close,[4] a society had sought to take advantage of the

[1] 1 Shower 135. [2] 366 5 S.T. [3] (1870) L.R. 1 C.C.R. 230.
[4] (1867) L.R. 2 Q.B. 153.

Friendly Societies Act, 1855, which gave power to such an organization to recover monies wrongly taken from it by members before the Justices if it were established for a purpose not illegal. The Court held that, although the object of Hornby's society (the Boilermakers') was, in part, the relief of sick members, yet, in so far as one of its principal objects was the support of members on strike, it was a society established for an illegal purpose and refused all aid to recover monies stolen by defaulting members. Thus, apparently, before 1871 a trade union illegal at common law by reason of its objects being in restraint of trade was without legal redress and must be considered, if not criminal, to have been at least an outlaw.

The Act of 1868, which authorized the prosecution by joint owners of property against one of them, did not give the trade union any means of recovering their funds in a civil action, and, after another decision, Farrer *v.* Close,[1] had followed Hornby's case (despite the fact that in R. *v.* Blackburn[2] it had been held that the criminal remedies in the 1868 Act could be used by trade unions), there was passed the Trade Unions Funds Protection Act of 1869,[3] by which the decision in Hornby *v.* Close was negatived and trade unions were expressly placed within the protection of the Friendly Societies Act, 1855.

§ 4.—Liability for Interference.

We now turn to that branch of law which is concerned with tortious acts, centring round the

[1] (1869) 4 Q.B. 602. [2] 11 Cox C.C. 157. [3] 32 and 33 Vict., c. 61.

right of persons to dispose of their labour or their capital as they will.

These proceedings, which, like the writ of trespass, originally partook both of a criminal and of a civil character, could be taken not only against a servant who left his master's service, but also against the person who enticed him away. A writ of trespass, if the servant was taken away, lay at common law, apart from the Statute of Labourers,[1] but later the writ against the enticer,[2] probably in the form of trespass on the case, came to lie under the statute.

The famous Gloucester Grammar School case[3] extended the right to trade without interference generally. In Garrett *v.* Taylor,[4] threats of personal injury and vexatious litigation were held to be an unlawful interference of a trader's customers. (See also Keeble and Hickeringill,[5] and Carrington *v.* Taylor, 1809;[6] cases of interference by the making and use of a decoy for ducks, so also Tarleton *v.* McGawley,[7] where natives willing to be customers were frightened by cannon.)

There is little doubt, however, that in this class of case, as in cases of restraint of trade, the law is more favourable to defendants than was formerly the case. In Springhead Spinning Co. *v.* Riley,[8] Malins, V.C., said,[9] "directly a man enters into a combination which has as its object the interfering with the perfect freedom of action of

[1] Y.B.B. 47 Edward III, Mich. Pl. 15; 11 Henry IV, Mich. Pl. 46. [2] Per Moyle, J. Y.B. 9 Edward IV, Mich. P. 1,4. [3] (1410) Y.B. 11 Henry IV, 4, 47, f. 21. [4] (1620) Cro. Jac. 567. [5] (1707) 11 East 573. n. [6] 11 East 571. [7] (1794) Peake, N.P.C. 270. [8] (1868) L.R. 6 Equity 551. [9] Page 558.

another man, it becomes an offence, and this statement, together with the much quoted opinion of Sir William Erle, in his memorandum to the Royal Commission of 1869, that "every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will," now require considerable qualification, at any rate where the interference arises from legitimate competition (see Mogul Steamship Company *v.* Macgregor, Gow and Co.).[1]

It is, however, still clear law that the interference with contractual relations without justifications by a third person is unlawful. The leading case on this matter is that of Lumley *v.* Gye,[2] and a person commits an actionable wrong if, in the words of Erle J.,[3] "he knowingly and for his own ends induces another person to commit an actionable wrong to a third." If a person does such a wrongful act calculated, naturally, to produce injury and, in fact, producing it, it is no defence that the natural consequence is an act done by a third person in breach of duty or contract. This was decided in Bowen *v.* Hall,[4] and is only mentioned here because it disapproves of the case of Vicars *v.* Willcocks,[5] which is apparently to the contrary. The interference must, however, be a real and intended one (Wolstenholme *v.* Ariss).[6]

We have now summarised the principal legal problems which came up for consideration before the Royal Commission of 1869. Curiously

[1] [1892] A.C., 25, 36, 42, 52. [2] (1853) 2 E. and B. 217. [3] Page 232. [4] (1881) 6 Q.B.D. 333. [5] (1806) 8 East 1. [6] [1920] 2 Ch. 403.

enough, that enquiry, which ultimately resulted in so wide a legal emancipation of trade unions, was originally constituted in order to enquire into various charges against them. A number of crimes at Sheffield, culminating in the explosion of some cans of gunpowder at the houses of unpopular workmen, and a general fear of trade unions—those "fearful engines of mischief ready to riot or assassinate," as Dr. Arnold had called them—caused the Government to announce the appointment of a Royal Commission of Enquiry in 1867. The enquiry was to extend to all outrages in Sheffield and elsewhere and into trade unionism generally.

It was just at this time that the case of Hornby *v.* Close had decided, in substance, that trade unions had no legal status, and, from the beginning of the sittings of the commission, it was the object of Mr. Frederick Harrison and Professor Beasley, on behalf of the men, to obtain legal recognition for the societies.

The evidence of Robert Applegarth, the general secretary of the Carpenters' Union, helped to satisfy the commission that a broad distinction had to be drawn between trade unions proper and isolated outrages, which distinction was preserved in subsequent civil and criminal legislation.

There were two reports as a result of this enquiry, but the minority one found more favour; the temporary Act of 1869, to protect Trade Union funds, was hastily passed and, in 1871, the Government introduced two measures, the one

dealing with civil, the other with criminal matters.

As regards the latter, the Criminal Law Amendment Act, 1871, it repealed the Act of 1859 and the Act of 1825 also. In place thereof it provided that it was a criminal offence to intimidate any person in such a manner as would justify a Justice of the Peace binding over the person who intimidated in order to coerce the other person to dismiss a workman or quit his employment or to belong or not to belong to any organization or to alter his method of carrying on business or the number or description of his employees. There followed a new definition of the old vexed words "molestation and obstruction," which were now confined to cases of persistently following a person from place to place, hiding tools or clothes or watching or besetting the house or place where such person is, or following him with two or more persons in a disorderly manner through any road.

Although this Act provided that no person should be liable to punishment for doing or conspiring to do any act on the ground only that such act restrains the free course of trade, unless the act was one of coercion as in the Act defined, there was great opposition to the section dealing with watching and besetting which, it was thought, would prevent all picketing.

The decisions which followed this statute certainly had the effect of restricting rather than increasing the legal freedom of industrial action. In 1871, seven women were imprisoned in South Wales for saying "Bah!" to a "blackleg," and there

were numerous convictions for bad language which was construed as coercion; but the most important decision of all, one which, according to Sir James Stephen, caused the amendment of the Act in 1875, was the case of R. *v.* Bunn, generally known as the Gas-stokers' case, in which Mr. Justice Brett, afterwards Lord Esher, decided that, for a number of workmen to strike in breach of contract to procure the reinstatement of a dismissed employee, without using any specific threat or violence, was an improper molestation of the employers' right to employ whom he would within the Act, and was therefore criminal. This was followed, in R. *v.* Hibbert,[2] by a decision of Baron Cleasby that picketing would become unlawful if it caused the employer "a dread of loss," for instance, "suppose it was proved that there was a confederacy which rendered it impossible for the employers to continue their business for want of workpeople —carried out by waylaying and offering money to their workmen and men seeking employment from them—this would be an indictable offence."

Finally, in 1875, the Criminal Law Amendment Act of 1871 was repealed and its rigour much mitigated by the Conspiracy and Protection of Property Act, 1875,[3] which is still unrepealed and constitutes, together with the Trades Disputes Act, 1906, the present principal statutory law affecting trade unions in their criminal and tortious aspects.

[1] (1872) 12 Cox. C.C. 316. [2] (1875) 3 Cox C.C. 82. [3] 38 and 39 Vict., c. 86.

§ 5.—LEGALIZATION.

The recommendations of the Royal Commission of 1869 as to the legal status and civil liabilities of trade unions were adopted almost in their entirety. Unlike the Criminal Law Amendment Act, which has just been discussed, the Trade Union Act of 1871[1] has never been repealed or even seriously amended. It remains to this day the principal Act dealing with trade unions on their civil side, and round it most of the judicial decisions affecting the contractual or personal status of trade unions have gathered. Lord Farwell points out, in Osborne *v.* The Amalgamated Society of Railway Servants, that "prior to the passing of the Act of 1871, a trade union, as such, had no legal status. It was, speaking generally, an association of wage earners for the purpose of improving or maintaining the conditions of employment. It combined the objects of a friendly society with those of a trade guild. In the former capacity it gave relief to its members when out of work from sickness or accident, that is dispute and unemployed benefit; and in the latter capacity it bargained with employers on behalf of all its members, and, with influence of a united body, for higher wages, shorter hours and the like. These and such as these were the proper functions of a trade union in 1871."[2]

It will be observed that, by the 1871 Act, the legislature did not distinguish, as did the judges in Hornby *v.* Close, between the benevolent and trade purposes of a trade union, but frankly legal-

[1] 34 and 35 Vict., c. 31. [2] [1909], 1 Ch. 163, at p. 188.

ized a society even though it were in restraint of trade at common law. Lord Macnaghten in Osborne's case, after pointing out the normal dualism of object in a trade union says, "When the struggle began which led to the Act of 1871, those who managed the case on the part of trade unions insisted that the benevolent purposes of a trade union were to be regarded as secondary and subordinate to its trade purposes. They objected to any separation of funds as being calculated to paralyse the efficacy of the institution and tantamount to a proposal to suppress unionism by statute. Hence it comes that the benevolent purposes of a trade union, though referred to in the Trade Union Act, 1871, are not mentioned in the definition of a trade union."[1]

This definition, referred to by the learned Lord, which has been the subject of much judicial comment, is as follows: "The term Trade Union means such combination, whether temporary or permanent, for regulating the relations between workmen and workmen, or between workmen and masters, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

It will be observed that the term is expressly confined to combinations unlawful at common law. A trade union type of society which might have some few of its objects in restraint of

[1] [1910] A.C. 87, at p. 95.

trade, but yet might be predominantly a lawful friendly society, would therefore have been excluded from the definition of a trade union under the 1871 Act. This omission, as we shall see, was dealt with in the Act of 1876, and is referred to by Lord Alverstone in the case of Chamberlain's Wharf Ltd. *v.* Smith.[1]

Nevertheless, as was said by Lord Justice Fletcher Moulton in Osborne's case,[2] "the legislature did not create the name for the purpose of the Trade Union Acts. It was at that time a well-known term, connoting combinations of a well-known type formed for objects and purposes which were well recognized." Lord Cockburn in Hornby *v.* Close had discussed the term "Trade Union," and, although the word "Society" was first used in preference to "Trade Union" to indicate an industrial organization, the terms "Union" and "Trade Union" are used as early as the beginning of the nineteenth century.[3]

Turning to the 1871 Act itself, section 2 provides that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise. This section should be read in connection with the Criminal Law Amendment Act of 1871 which made a similar provision, it will be remembered, coupled with specific liability for certain stated illegal acts.

Section 3 of the 1871 Act provides that the

[1] [1900], 2 Ch. 605, at p. 611. [2] [1909], 1 Ch. 163, at p. 184.
[3] See *Trade Unionism*, 2nd Ed., Slesser (Methuen), Chs. 1 and 2.

purposes, as stated in section 2, being in restraint of trade, shall not be unlawful so as to render void or voidable any agreement or trust. So far then it would appear that a trade union, after 1871, could make valid contracts with the world at large, but there follows that curious legal anomaly, section 4, of which the side-note in the statute is "Trade Union contracts when not enforceable," which provides that nothing in the Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of "—certain domestic agreements between trade unions and their members and between one union and another.

This provision, whether it has achieved its purpose or not, was inserted as the result of the minority report of the 1869 commission, which had recommended that trade unions should be given some legal status, but that the Court should be restrained from interfering in purely domestic inter-union matters.

The method adopted in section 4 for achieving this result strikes one as being more subtle than artistic, and, no doubt, a direct restraint of the Court, rather than a refusal of an enabling provision, would have rendered unnecessary the mass of litigation which has centered round this cryptic section.

Lord Moncreiff, Lord Justice Clerk, in M'Kernan *v.* the United Operative Masons Association,[1] observed "When we see the history of the previous proceedings in the report of the commis-

[1] (1874), 1 Rettie, p. 453.

sioners, it is quite clear that it was the intention of the legislature to arrive at this, that the taint of illegality in respect of restraint of trade was to be entirely and absolutely removed, but that the question of enforcement in courts of law was to be matter of positive statutory enactment."

In Shanks *v.* the Same,[1] Lord President Inglis said, "The object of the Act is to give relief to trade unions in certain clearly defined directions, to enable them to sue certain actions and enforce certain rights which they could not sue and enforce before," and, in Aitken *v.* The Associated Carpenters and Joiners of Scotland, the same judge said,[2] "The spirit and object of Section 4 is, I think, to take the laws of trade unions, in their administration, out of the cognisance of the ordinary tribunals, in other words, to deprive members of trade unions of the benefit of applying to the ordinary tribunals of the country to enforce the provisions of their associations."

A peculiar feature of the Trade Union Act, 1871, is the careful manner in which it deliberately abstains from giving to a trade union the status of incorporation. According to George Howell, one of the trade union leaders responsible for the 1871 Act, the omission was deliberate. In the words of Lord President Inglis, in Aitkin *v.* the Associated Carpenters and Joiners of Scotland,[3] "trade unions remain voluntary associations of which the law can take no special cognisance as collective bodies, and it is provided by the fifth

[1] (1877), 4 Rettie, 823. [2] (1885), 12 Rettie, 1206. [3] (1885) 12 Rettie, 1, 206.

section of the 1871 Act that the Acts relating to friendly societies and industrial and provident societies and the companies acts shall have no application to trade unions, the object apparently being to make careful provision that they shall not have any corporate existence or capacity whatever."

We shall have occasion to observe how this view was qualified in several later cases, notably those of Taff Vale,[1] and Osborne,[2] but the statement of the Lord President, made so soon after the sitting of the Commission and the passing of the Act, shows the intention if not the achievement of its promoters.

The legal consequences of the refusal to accept incorporation can hardly have been realized by the lay promoters of the 1871 Act. We remember the remarks of Maitland, as to the failure of English lawyers to establish any definite doctrine with regard to unincorporated associations.[3] Equity has placed a trust at their disposal and places round their property what Mr. Carr in his *Law of Corporations* had called "a hedge of trustees." This is but one problem, the holding of property, which the 1871 Act dealt with in a piecemeal manner, leaving the unregistered trade union unprovided; there is also the question of making devises, and holding land, in which again the registered trade union alone is catered for; the whole question of suing and being sued in the Courts has produced litigation which we shall discuss hereafter, and many other problems of contractual and tortious capacity and liability have arisen which

[1] [1901] A.C. 426. [2] [1910] A.C. 87. [3] Collected Papers, 3, 271.

might have been avoided, in part, at any rate, had the trade union submitted to incorporation.

Nevertheless, although the Act, in sections 6 and onwards, is concerned with the setting up of machinery for the registration of trade unions, it cannot be too clearly recognized that such registration, unlike the case of a corporate limited company or provident society, effects no fundamental change in the legal position of the trade union. For example, to anticipate a later decision, the doctrine of *ultra vires* which arose in Osborne's case, where the union was registered, was applied to an unregistered union in the case of Wilson *v.* The Scottish Typographical Association[1] on appeal, and a similar view was taken by Vice-Chancellor Leigh Clare in the Lancaster Palatine Court (July 8th, 1910), and by Lord Halsbury in Osborne's case, though, in the House of Lords in that case, Lord Macnaghten[2] did not seem so clear on the point. Moreover, the observations of Lord Halsbury in the Taff Vale case seemed to apply the doctrine of tortious liability of trade unions or their agents to all trade unions whether they were registered or not.

Passing to the actual methods and results of registration, Lord Justice Farwell, in Osborne's case,[3] compendiously states the effect of the sections dealing with registration as follows: "The act makes provision for the registration of trade unions with resulting advantages not given to unregistered societies. The Act is framed on the lines of the Companies Act, 1862, and pro-

[1] [1912] S.C. 534. [2] At page 94. [3] [1909] 1 Ch. 163, at p. 190.

vides that any seven or more members of a trade union may, by subscribing their names to the rules of the union, register the union with a name and exclusive right thereto. Such union can buy and sell land, not exceeding one acre, and personal estate, without limit of amount, for the use and benefit of such trade union and the members thereof. Trustees have power to bring and defend actions touching such property. Treasurers and officers are bound to account and annual returns have to be made to the registrar of the assets and liabilities, receipts and expenditure of the union, and the union must have rules in the scheduled form, by which, amongst other things, it is required to state the whole of its objects, and provision is made for its amalgamation with other unions and its winding up. A registered trade union is thus a statutory legal entity, anomalous in that although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents."

Although Lord Farwell in this case, in the ultimate sentence quoted, confines his remarks to registered trade unions, it is clear, from his observations in the Taff Vale case, that he did not regard an unregistered union as occupying any different fundamental legal position, for in that case he says, without qualification, "A trade union is neither a corporation nor an individual, nor a partnership between individuals. It is an association of men which almost invariably owes its legal validity to the trade union acts" and "The legislature, in giving a trade union the capacity to own

property and to act by agents, has, without incorporating it, given it two of the essential qualities of a corporation."

The Trade Union Act of 1871 has been subsequently amended by the Trade Union Acts of 1876, 1913 and 1917. The 1913 Act has created a third type of union, as well as the registered and unregistered one, namely a trade union which, though unregistered, holds a certificate from the Registrar that it is a trade union, but the Courts have not yet had occasion to consider what are the effects of this certification on the general legal status of the society.

Finally, therefore, in beginning our study of the existing law, we have to have regard in particular to six Acts of Parliament; the four Trade Union Acts of 1871, 1876, 1913 and 1917 on the civil side, and the Acts of 1875 and 1906 on the tortious and criminal. As regards the common law, a trade union raises all those legal problems which are to be expected in a voluntary unincorporated society, together with those to be met in a body acting for the most part in restraint of trade, and almost necessarily committed to activities which may prove tortious at common law. Both the legislation and the case law have been intermittent, often inconsistent and quite unsystematic. From these observations it will appear that the study of trade union law is not an easy matter.

LECTURE II.—TORTIOUS & CRIMINAL.

§ 1.—Criminal.

In a former lecture I have endeavoured to trace the development of the criminal law as it affects trade unions down to the passing of the Conspiracy and Protection of Property Act, 1875, and, as I have already indicated, that statute now forms the principal Act from which the liabilities of trade unions may be gathered, and I shall not further discuss any authorities or cases prior to that Act.

Section 3 of the Conspiracy Act provides that an agreement or combination by two or more persons to do or to procure to be done any act in contemplation or furtherance of a trade dispute between "employers and workmen" shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

It will be noticed that the second limb of the definition of a trade dispute, now contained in the Trades Disputes Act, 1906, namely a dispute between workmen and workmen, is missing in the 1875 Act, but the Act of 1906 is retrospective in this respect, and therefore the definition in the 1875 Act is now the same as the definition which we shall discuss when we consider the law of tort.[1]

The mischief to which this section is directed will become clear when we recall the history of liability for criminal combination. By section 17 of the Act of 1875, the Molestation of Workmen Act, 1859, is repealed, and it will be remembered how the Combination of Workmen Acts, 1824

[1] *Infra*, pp. 61, 62.

and 1825, had, before that time, repealed the remaining statutes dealing with illegal combinations of workmen, so that section 1 of the 1875 Act can only have reference to the common law liability of combinations in restraint of trade if any such ever existed. It will be noticed that section 3 is limited to cases of a trade dispute, and, therefore, if there be any type of industrial action which does not fall within that definition, there is nothing in the section to protect it from such legal consequences as may exist at common law with regard to conspiracy. We may note in addition a curious proviso that "nothing in this section shall affect the latter relating to any offence against the State or the Sovereign." The provision against the State does not, I think, mean offences in the sense in which the recent Emergency Powers Act uses the word, but has reference to something more definitely hostile to the State in the nature of treason, or felony, and, if the view is correct that there is at common law no such offence as a criminal combination in restraint of trade, the proviso concerning the State in section 3 of the 1875 Act is really nugatory and leaves the law in very much the same state as it would have been had the section never been passed. Section 4 contains a specific exception to the right of persons to be immune from criminal prosecution if they break contracts, in cases where such persons are employed by municipal corporations or authorities, companies or contractors upon whom is cast the duties of supplying any city or other place with gas and water. If anyone maliciously breaks his

contract of service knowing or having reasonable cause to believe that the consequences of his so doing either alone or in combination with others will deprive the inhabitants of their supplies, they are criminally liable, and section 5 attaches a similar liability to persons breaking contracts with a similar knowledge that they will endanger human life or cause serious bodily injury or expose valuable property to destruction or serious injury. The Electrical Undertakings Act, 1919, extends the liability to electrical works.

This section is in part a survival of the old Master and Servants Acts which made all breaches of contract of service criminal, and in part of the gas workers strike of 1873 which resulted in the decision of Lord Esher in Rex *v.* Bunn,[1] which, in its turn, according to Sir James Stephen, produced the 1875 Act.

I have been unable to find any case which turns upon either of these sections, and, no doubt, to-day their place would be adequately taken by the recent Emergency Powers Act and the regulations made thereunder.

The most important section of the 1875 Act is section 7, which is as follows:

"Every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,

1. Uses violence to or intimidates such other person or his wife or his children, or injures property; or,

[1] (1872) 12 Cox C.C. 316.

2. Persistently follows such person about from place to place; or,

3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of, or hinders him in the use thereof; or,

4. Watches or besets the house or other place where such other person resides, or works, or carries on business or happens to be, or the approach to such house or place; or,

5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road," shall be liable either to pay a penalty not exceeding twenty pounds, or to three months' hard labour. Save on a first offence, the penalty if imposed cannot be reduced to less than £5.

It will be convenient to consider this section point by point. The penalty for the offence is twenty pounds or imprisonment not exceeding three months. The information may be laid by a police officer and not necessarily by the person intimidated.[1] The defendant is entitled to a jury.[2] The compulsion on another need not be effective,[3] for the offence is "with a view to compel." There are several decisions as to the technical accuracy of the charge or conviction, for they must be stated with accuracy; thus it is not proper in a conviction to use the words "with a view to compel him to abstain from doing *acts* which he has a legal right to do,"[4] but, according to Mr. Justice Bruce, if the conviction had followed the words of the statute

[1] Young *v.* Peck (1912) 77 J.P. 49. [2] R. *v.* Mitchell (1913) 1 K.B. 561. [3] Agnew *v.* Munroe (1891) 28 S.L.R. 335. [4] R. *v.* McKenzie [1892] 2 Q.B.D. 519.

and said "act" instead of "acts," the conviction would have been upheld. In Smith *v.* Moody,[1] the description of the act, namely "to abstain from working for J. B. and F.'s colliery," was considered an offence, and McKenzie's case was distinguished and explained.

The person against whom complaint is made may either be an employer or a workman.[2] It must be observed that the complaint must be done "wrongfully and without legal authority." These words should be inserted in the complaint or indictment,[3] but their absence is not fatal.[4] In Ward *v.* Operative Printers Assistants Society,[5] the words "wrongfully and without legal authority,"[6] were held to limit the remedy of criminal prosecution to cases so tortious as to give a civil remedy and it was further held that to compel a person to pay union wages by trying to get all the men into a union so that there would be no non-union men to employ was neither a civil or criminal offence. Lord Justice Fletcher Moulton says it is inaccurate to say that masters have a right to employ men on any specific terms, they have only a right to employ such, if any are willing to accept those terms, and no wrong is done them by any one who, by lawful means, resents the number of those willing to accept them. All the sub-sections are really different modes of committing one offence, and it is not essential in the complaint to specify any particular sub-section.[7]

[1] [1903] 1 K.B. 56. [2] [1896] Lyons and Sons *v.* Wilkins, 1 Ch.D. 811 (per Kay L.J. at p. 830.) [3] Lyons & Sons *v.* Wilkins, page 266. [4] (1894) Clarkson *v.* Stewart, 32 S.L.R. 4. [5] (1906) 22 S.L.R. 326. [6] Page 329. [7] (1909) Wilson *v.* Renton, 47 S.L.R. 209.

We now pass to the actual offences contemplated by the statute. The first is that of using violence to or intimidating another person. To charge a person with using violence to, or intimidating, is bad for duplicity.[1] As regards the word "intimidate" it will be remembered that this word has had a long history and many trade union activities were formerly held to be an intimidation under particular statutes, which no longer are so. In Judge *v.* Bennett[2] it was held that it was an intimidation to write to an employer that his shop would be picketed in language so threatening as to make a threat, but this case was not followed in the case of Gibson *v.* Lawson,[3] in which it was not intimidation to communicate to an employed person an intention to strike and thus put that person in fear of being unable to get work. In Rex *v.* McKeevet,[4] Mr. Justice Kay said that to constitute an intimidation there must be a threat of personal violence, and it was held in Gibson *v.* Lawson that the intimidation must be such as would justify a man being bound over to keep the peace, and this view may now be accepted as the existing law on this sub-section. A threat or intimidation in the criminal sense is not necessarily the same as a threat which would constitute the basis of a civil action in tort.[5] Where there is a threat alleged, the words need not be set out, Clarkson *v.* Stewart,[6] but the specific acts of intimidation must be set out in the conviction.[7]

[1] R. *v.* Edmunds (1895) 59 J.P. 776. [2] (1887) 52 J.P. [3] [1891] 2 Q.B.D. 545. [4] (1890) *Times*, Dec. 16th. [5] See Lord Herschell in Allen *v.* Flood [1898] A.C. 1, at p. 128. [6] (1894) 32 S.L.R. 4. [7] Metcalfe *v.* Wiseman (1888) 52 J.P. 439.

The next case on which there has been authority is the offence of following the person from place to place. The gist of the offence is not the following but the compulsion as a result of the following,[1] and it has been held not to be illegal to follow with a view to compel an employer to take back a dismissed employee;[2] to follow silently at a short distance if at the same time a crowd is following with hostile gestures may be an offence.[3] It will be noticed that, later on in the section, it is made an offence to follow a person with two or more other persons in a disorderly manner in or through any street or road. Apparently, therefore, a single individual who persistently follows a man on private property or in a public park may be liable, but as regards a street or road there must be at least two and follow in a disorderly manner.

Next follows the provision as to watching or besetting, which, it may be remembered, formed the basis of so many of the prosecutions in the earlier Acts. To beset A's house in order to exercise compulsion on B is within this provision.[4]

It does not matter for how long a time there is watching or besetting.[5]

By the Trades Disputes Act, 1906, section 2, it was provided that,

"1. It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade

[1] Rex *v.* McKenzie (*ibid*). [2] Rex *v.* Wall (1907) 21 Cox C.C. 401. [3] Smith *v.* Thomason (1890) 16 Cox C.C. 740. [4] Lyons & Sons *v.* Wilkins [1899] 1 Ch. D. 255 (see also, Wallis *v.* United French Polishers (1905) *Times*, Nov. 28th, where there is no allegation of disorder at all.). [5] Charnock *v.* Court [1899] 2 Ch. 35; Walters *v.* Green [1899] 2 Ch. 696.

union, or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works, or carries on business, or happens to be, if they so attend, merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working.

2. Section 7 of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from 'attending at or near' to the end of the section."

On this section, the Attorney-General, Sir John Walton, in introducing the Trades Disputes Act into the House of Commons, said, "The right of peaceful persuasion is an essential part of the right to strike. The law at present is in an absurd position. It is held to be perfectly lawful to point out to the men what are the points of difference. You may either ask for information with regard to the strike, or you may give them information with regard to the reason of the conflict between the workmen and the employer. But, if you go one step further and so present the information you give them as to make your appeal in the nature of persuasion you are then violating the law."

The Attorney-General further pointed out that this section only revived the law of 1859, which excepted peaceful persuasion from the offences of molestation and obstruction contained in the Act of 1825, a law which the Act of 1875 had been said to repeal.[1]

[1] *Parl. Debates*, 4th series, 154, col. 130.

Where there is no trade dispute in contemplation or furtherance, attendance at or near the place where a person happens to be in order merely to obtain or communicate information, though formerly expressly exempted from illegality by the proviso of section 7 of the Conspiracy and Protection of Property Act, 1875,[1] would now, owing to the repeal of that proviso, seem to be unlawful.

The immunity afforded by the 1906 Act must be strictly limited to peaceful picketing. Watching and besetting, or trespass, or any other improper act is still unlawful. The Trades Disputes Act of 1906 and the 1875 Act must be read together, or rather the latter Act must be read as amended by the former. The seventh section of the 1875 Act was partially repealed by the 1906 Act, and section 7 of the 1875 Act must be read as if section 2 of the 1906 Act was embodied in it. The former Act relates to besetting or watching, which is plainly an external operation. The words in the second section of the 1906 Act are in like manner to be read in connection with the words besetting and watching, thus indicating what may be lawfully done without, but not within, a house or place. It was not intended to enlarge the field of operations—the physical area of the operations of representatives of trade unions or of others. It was never intended to authorize as a matter of right an invasion into a man's house or entry against the will of the owner.[2] The sec-

[1] (1875) 38 and 39 Vict., c. 86.

[2] Per Lord O'Brien, L.C.J., in Larkin *v.* Belfast Harbour Commissioners [1908] 2 Ir. R., K.B.D. 214, at p. 219.

tion refers to a mere "attending" which is more temporary than "watching." The immunity does not extend to a "watching" purposing to compel a person to do an act.[1]

Section 16 of the 1875 Act declares that nothing in the Act shall apply to seamen or sea apprentices. "Seamen" means persons employed under and subject to the Merchant Shipping Acts,[2] that is every person (except masters and pilots) employed on board any ship.[3] The exemption merely means that seamen cannot be made liable to punishment under the Act,[4] it does not prevent them from bringing an action.[5] Similar offences, when committed by seamen, are punishable under the Merchant Shipping Act, 1894, section 236, with a fine of £10.

During the late war, a number of Acts which would have been lawful at common law were made expressly illegal. Thus, under the Munitions of War Acts, it became a criminal offence, in certain circumstances, to strike, and the procurement of strikes by others, resulting in the interference of the supply of material to be used in war, was also made criminal by certain regulations under the Defence of the Realm Acts, but, apart from these temporary statutes, either because of a changed philosophy as to the functions of the State or owing, perhaps, to exigencies which did not exist

[1] Per Palles, J., in R. *v.* Wall and Others (1907) 21 Cox, C.C. 401, at p. 403. [2] R. *v.* Lynch [1898] 1 Q.B. 61. [3] (*a*) 57 and 58 Vict., c. 60, s. 742. [4] R. *v.* Wall (1890), 112 C.C.C. Sess. Paper 880; R. *v.* Cole, (1891) 13 C.C.C. Sess. Papers 622; R. *v.* Phillips, *ibid.* [5] Kennedy *v.* Cowie [1891] 1 Q.B. 771; Gibson *v.* Lawson [1891] 2 Q.B. 545; Curran *v.* Treleaven *ibid.*, 553; R. *v.* McCarthy [1903] 2 Ir. K.B.D. 146.

hitherto, the legislature has recently set out to limit that complete freedom of combination which has so often been demanded, but never completely obtained. Thus the Police Act of 1919, after setting up a kind of statutory federation to represent the interests of the police, goes on in section 2 to make it illegal for a policeman to join a trade union or any association having for its objects the control of the pay, pension or conditions of service of the Police Force, and any person who contravenes the provision forfeits all pension rights and his membership of the Police Force. The Minister of Labour is made the determining authority as to whether the association is a trade union within the meaning of the Act. Another section, section 3, makes it a criminal offence to do an act calculated to cause disaffection among the members of the police, or to do any act calculated to induce any member of a police force to withhold his service; thus so far as the police are concerned, broadly speaking, the position is as it was between the passing of the Combination Acts of 1800 and their repeal.

We must consider shortly the Emergency Powers Act, 1920. It is a statute empowering the Government, under certain circumstances, to make regulations to maintain the social fabric in times of a general strike. The Act provides, in terms, that no regulation shall enforce "industrial conscription," whatever that word may mean, nor shall any regulation make illegal the calling of any strike, striking or the inducing of threats to strike, nor may such regulation create

any new criminal procedure for dealing with offences under them.

We now turn to certain actions, of a tortious type, which have turned upon the Conspiracy and Protection of Property Act, 1875, of which the leading case is Lyons *v.* Wilkins. It is true that to some extent this class of case has been affected by section 2 of the Trades Disputes Act, 1906, but how far this section has really altered the law will become clearer hereafter.

In Lyons *v.* Wilkins[1] it was held that the picketing of the works of an employer for the purpose of persuading people not to work for him was a watching and besetting with a view wrongfully and illegally to compel persons to abstain from doing a lawful act within the meaning of section 7 of the 1875 Act. The defendants, who were officers of a trade union, ordered a strike against the plaintiff manufacturers and also against "S," a person who made goods for the plaintiff only, and their pickets, by their directions, watched and beset the works of the plaintiff and of "S" for the purpose of persuading workpeople to abstain from working for the plaintiffs.

The Court of Appeal held that this kind of picketing "S," for the indirect purpose of injuring the plaintiffs, was illegal and they granted an injunction to restrain the defendants and their agents from watching or besetting the plaintiffs works, or those of "S," for the purpose of persuading or otherwise preventing persons from working for them except merely to obtain or com-

[1] [1896] 1 Ch. 811.

municate information. It had formerly been held in the case of Trollope *v.* London Building Trades Federation,[1] that the distribution of a poster edged with black containing the names of members who refused to strike was actionable, as being done for the purpose of compelling an employer to dismiss men in breach of contract; so also in Pink *v.* Federation of Trades and Labour Unions,[2] an injunction was granted restraining a circular which falsely alleged that the plaintiffs had boycotted men in their employment and also induced other members not to deal with the plaintiffs. On the other hand, in Peto *v.* Apperly,[3] the distribution of a notice inviting trade unionists to keep away from a shop during a dispute was held lawful. This was followed in Haile *v.* Livingstone, reported in the same volume and page, where a trade union secretary appealed for the boycott of a tradesman. This was also held justified as being in their own interests, so also in Jenkins *v.* Neild,[4] and in Bullcock *v.* St. Anne's Master Builders' Federation.[5] In both of which cases the question whether the poster was issued to protect the issuers' interests or to injure the plaintiff was treated as a question of fact. All these cases were cited before the Court of Appeal in Lyons *v.* Wilkins as authorities for the proposition that the legitimate personal interests of the persuader may be a justification, but the Court, relying upon the expressed words of section 7 of the 1875 Act, held that to watch and beset otherwise than merely to obtain

[1] (1896) 12 T.L.R. 373. [2] (1892) 8 T.L.R. 216, 711. [3] (1891) 35 Sol. J. 792. [4] (1892) 8 T.L.R. 549. [5] (1903) 19 T.L.R. 27.

or communicate information was unlawful. It will be remembered that this qualification on the illegality of watching others has now been repealed, but it is unlikely that any court in cases where the Trades Disputes Act did not apply would go further than the decision in Lyons *v.* Wilkins. Lyons *v.* Wilkins came again before the Court of Appeal for trial as to a perpetual injunction.[1] Judgment was postponed until the decision in the House of Lords in Allen *v.* Flood had been given, and that case was before the Court of Appeal when they proceeded to consider their judgment. Lord Lindley thought there still remained a clear distinction between persuading and giving information and Lord Justice Chitty also took the view, as did also Lord Justice Vaughan Williams, that Allen *v.* Flood had no application to the case before the court, and the injunction was therefore continued.

The result of this decision is difficult to understand. The communication of information was held lawful, but persuading was held to be unlawful, but it does not require a psychologist to see that the giving of information itself may have a persuading force and, indeed, the giving of information for any other purpose than to influence the mind of another is extremely unlikely; but it is just this sort of information which the Court of Appeal appear to have held to have been unlawful.

In a recent case of McKusky *v.* Smith,[2] the Irish court, following the previous decision of Larkin *v.*

[1] [1899] 1 Ch. 255. [2] [1913] 2 I.R. 432.

Belfast Harbour Commissioners,[1] held that attending at or near a place to give information does not authorize any trespass upon the premises themselves, and that, in any event, the act done during a trade dispute of persuasion may in reality be picketed for political or personal motives so as to lose the protection of that section, and the tendency of the House of Lords to construe the Trades Disputes Act, 1906, very strictly has made it impossible to say that the "Watching and Besetting" section of the 1875 Act is entirely obsolete.

There remain to be considered certain criminal responsibilities of the officials of registered trade unions under the Trade Union Act of 1871 for failing to make the required returns under the Act, together with provisions as to the prosecution of officers and others by a summary process provided in the Act of 1871.

Taking the liability of the official first, a trade union failing to give any notice which the statute requires to be sent to the Registrar in the case of a union carrying on business in more than one country, or in case of change of name or amalgamation or dissolution, and every officer bound by the rules to give the same, unless proved to have been ignorant at the time of the action, is liable to a penalty not less than £1 and not more than £5, recoverable summarily before the magistrates at the suit of the Registrar or of any person aggrieved, and to a default penalty of a like amount for each week during which the action continues.[2]

[1] [1908] 2 I.R. 214.
[2] Trade Union Act (Amendment) Act, 1876, section 15.

It is a misdemeanour to give a member or intending member of a registered trade union a copy of rules which are not the existing rules with intent to mislead or to deceive, and there is also an obligation to make annual returns to the Registrar, the failure of which also renders the trade union and officers liable to a £5 fine, and to make a false return involves a liability not exceeding £50.[1]

Finally we come to the machinery for suing members who, by false representation or imposition, have obtained possession of the property of the union or have wilfully withheld or fraudulently misapplied the same. This section, it may be remembered, arose out of the case of Hornby *v.* Close and the consequent Trade Union Funds Protection Act, 1869. On complaint to a court of summary jurisdiction the court may order the delivery of all the property or the return of the monies misapplied, together with an additional £20 and costs not exceeding £1. In default of demand the court may order imprisonment for three months.

The procedure is peculiar. It is only available where there is fraud or dishonesty.[2] For in other cases there is a remedy given in section 7 of the 1871 Act.[3] If an officer is ordered to pay and is subsequently fined for failure, he cannot afterwards be sued for the recovery of the amount, and in Verdun *v.* Watson,[4] Lord Halsbury pointed out, at page 290, that, had the statute been confined

[1] Trade Union Act, 1871, S. 16, 18. [2] Madden *v.* Rhodes [1906] 1 K.B. 543. [3] See Barrett *v.* Markham (1872) L.R. 7 C.P. 405, and Knight *v.* Whitmore (1885), 53 L.T. 233. [4] [1891] 2 Q.B.D. 288.

to criminal proceedings alone, a civil action for the debt could have been maintained, but in so far as an order to pay is made by the magistrate previous to the penalty the imprisonment is an execution for the satisfaction of the civil debt. In the United Builders' Labourers Union *v.* Stephenson,[1] Farwell J. ordered the payment of the amount taken by an official of a registered trade union after he had been convicted and imprisoned under the Falsification of Accounts Act, 1875, a procedure which would bind both a registered and an unregistered trade union, and a similar course was taken in Agnew *v.* Addison.[2] It would appear, therefore, that if the amount is at all large it is unwise to have regard to the Trade Union Act of 1871, and better to proceed under the Larceny Act or the Falsification of Accounts Act, as in such a case the decision in Verdun *v.* Watson would not apply, and the debt might subsequently be recovered. In any event the summary provisions above stated apply to a registered trade union only, but the more general consequences of registration will be reserved for discussion in a later lecture.

§ 2.—TRADES DISPUTES ACT.

The Trades Disputes Act, 1906, contains provisions in section 4 which tend to exclude trade unions, as such, from the whole common law liability for tortious acts. That section provides, in terms, that "an action against a trade union whether of workmen or masters or against any member or official thereof on behalf of themselves

[1] [1906] *Times*, Feb. 7th. [2] 20 Rettie 19.

or other members of a trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any court." There follows in subsection 2 the following curious provision that "nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided by the Trade Union Act, 1871, Section 9, excepting in respect of any tortious act done by or on behalf of the trade union in contemplation or furtherance of a trade dispute."

In considering the extent of this unparalleled restriction of the Courts' power to deal with tortious acts we must assume, as was pointed out by Mr. Justice Astbury in the case of Valentine *v.* Hyde,[1] that the Act effects a material alteration in the common law and ought to be construed strictly.[2] Construing the act thus strictly, it will be noticed, in the first place, that the protection of section 4 is limited to cases of a trade union "whether of workmen or of masters," and the difficult question arises, a question which has never in fact been before the Courts: What is the position of a trade union which is neither one of workmen or of masters?

The word "workman" is defined in the Trades Disputes Act as all persons employed in trade or industry.[3] How far do these words extend? In the case of Dallimore and Williams,[4] a case of an alleged tortious act by the officials of a trade union of musicians, the point was never taken for

[1] [1919], 2 Ch. 129, at p. 153. [2] See Larkin *v.* Long [1915] A.C. 814, 832, 833, 834. [3] Sec. 5, sub-sec. 3. [4] (1912) 29 T.L.R. 67.

the plaintiff that a musician is not employed in trade or industry. .

It will be remembered that in the definition of a trade union, in addition to organizations for regulating the relations of masters and workmen, workmen and workmen, and masters and masters, the Act includes combinations which have for their purposes the imposing of restrictions on the conduct of any trade or business, and such a trade union would appear not to be a trade union either of masters or of workmen simpliciter; thus, it may well be, though the point has never in terms been decided, that the Trades Disputes Act, section 4, gives no protection to such a regulative association.

Before we pass to consider the scope of the statutory protection the provisions of the second subsection as to the liability of the trustees to be sued must be considered, together with the personal liability of officials of the union. As to the second point there are two cases to which attention should be drawn in particular. The first is that of Bussy *v.* Amalgamated Society of Railway Servants and Bell.[1] It was an action of malicious prosecution against a trade union and its secretary. Mr. Justice Darling held that, in so far as the words of section 4 applied to all torts, whether the union was engaged in a trade dispute or not, the union as such was immune, a view which was subsequently confirmed in the case of Vacher *v.* London Society of Compositors,[2] but the learned judge went on to hold that Mr. Bell, the official, was

[1] (1908) 24 T.L.R. 437. [2] [1912] 3 K.B.D. 547. [1913] A.C. 107.

liable, personally, and that, while officials are not liable to be sued on behalf of themselves and other members of the trade union, that means that they cannot be sued so as to make the trade union as such and its funds liable for their acts; but he decided, though not without doubt, that the immunity did not apply to the official personally even though he were in fact acting on behalf of the trade union.

The second case on this point is that of Richards and Bartram.[1] It was a case of libel, where one Richards sued the Variety Artists' Federation, a trade union, and the editor and printers of a paper called *The Performer*. The case was heard before Mr. Justice Darling, and, according to the report, the learned judge distinguishes the case from that of Bussy, and held that trade unions were liable if they committed torts unless such torts were committed in contemplation or furtherance of a trade dispute. I think it difficult to reconcile this judgment with that of Bussy's case, but in any event the House of Lords have now decided that Bussy's case is good law and therefore the case of Richards and Bartram may be regarded as overruled.

We now pass to the more general interpretation of both sub-sections of section 4 which are contained in Vacher's case.[2] The case, like that of Richards, was an action for libel against a trade union and the matter came before a court on an application to strike out the name of the trade union from the writ. Master Wilberforce

[1] (1909) 25 T.L.R. 181. [2] [1913] A.C. 107.

had struck out the trade union, but Mr. Justice Channell had restored it and the matter then came before the Court of Appeal.[1] Reference is made in argument to the case of Linaker *v.* Pilcher,[2] in which the funds of a union had been held liable for a libellous publication in a trade union newspaper and, while following Bussy's case in general, Lord Justice Vaughan Williams, at page 556, speaks of the second sub-section which recognizes the entertaining in certain cases of actions in tort brought against a trade union through its trustees. He said, "It seems that the liability of trustees of a trade union to be sued in the events provided by section 9 of the Trade Union Act, 1871, does not extend to torts committed by, or on behalf of, the union in contemplation or furtherance of a trade dispute," and he held that, in that case, the libel was such an act and, therefore, in any event, the trustees would be protected. But the problem remains, what would be the liabilities of the trustees and the trade union for torts where no trade dispute was in contemplation or furtherance? This matter was touched upon in the House of Lords by Lord Haldane.[3] He says, "the legislature appears to have desired to have drawn a distinction between a union and the trustees and to preserve the liability of the trustees under this section even in the case of tortious acts committed by the union, damages arising out of which might, as pointed out by Lord Lindley in his judgment in the Taff Vale case,[4] be made effective against

[1] [1912] 3 K.B.D. 547. [2] (1901) 70 L.J. (K.B.D.) 396. [3] [1913] A.C. 107, at p. 115. [4] [1901] A.C. 426.

property in the hands of the trustees." He agrees that, where there is a trade dispute, the trustees are protected, but his view appears to be that where there is no trade dispute it is still possible to sue the trustees and so to hit the trade union. Lord Macnaghten, on the other hand, says, "it is not easy to see the object of sub-section 2 of section 4, or to understand its precise meaning," and his Lordship thought that it would be better to leave the construction of that sub-section to be determined when it comes directly in question if ever that occasion arises. Lord Moulton appears on the whole to be in agreement with Lord Haldane.

We may now pass to more general considerations. Apart altogether from the Trades Disputes Act, the problem had arisen in the Taff Vale case as to how far a voluntary society not incorporated, such as a trade union, could be made liable in tort at all. The case of Linaker *v.* Pilcher, already mentioned, had assumed, at any rate, that the trade union, when registered, could be sued through its trustees in tort, but in the Taff Vale case this decision was practically ignored by counsel who drafted the pleadings, and the action proceeded against the trade union in its registered name, and it was held by the House of Lords that it could be so sued. In Lyons *v.* Wilkins the union had been sued in tort in its registered name, but the name was struck out.[1] But the point was really never argued. On the other hand, in Trollope *v.* London Building Trades Federation, a trade

[1] (1889) L.R. 1 Ch. 295.

union was restrained by injunction from publishing a libel.[1] Mr. Justice Farwell regarded a trade union as in a similar position to an incorporated society, a view which the House of Lords adopted in the Osborne case, and the House of Lords appear to have thought that an unregistered union could be sued in a representative action for tort in accordance with the decision in the case of Duke of Bedford *v.* Ellis,[2] notwithstanding that the old Chancery form of representative action was originally limited to cases of contract or cases affecting proprietary rights.

The law on this point is now, therefore, clear that a trade union is immune from all actions of tort if it be sued in its own name. It is not so clear, first, whether officials of a trade union may not be personally liable for torts committed on behalf of the trade union, and secondly, may not be sued so as to bind the union in cases of tort not committed in contemplation or furtherance of a trade dispute.

There is one other matter which must be considered in connection with section 4. It will be noticed that section 4 declares that an action shall not be entertained in respect of any tortious act alleged to have been committed. Does this preclude an action for injunction *quia timet* for a tort which a trade union may be anticipating or be about to do? The point was raised before Mr. Justice Lawrence in the case of Burn *v.* National Labourers' Union, but, owing to the fact that the defendants withdrew their plea under the

[1] (1895) 72 L.T. 342. [2] [1893] 1 Q.B. 435.

Trades Disputes Act, 1906, at the trial, it was never decided.[1]

We must next turn our attention to section 3 of the Trades Disputes Act which is as follows:

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person to dispose of his capital or his labour as he wills."

Several observations arise on this section. In the first place, it will be noticed, that, unlike section 4, there is no limit to the protection of a trade union or of its officials, but that it applies to persons generally. Secondly, it is limited, in terms, to cases of actions arisen in contemplation or furtherance of a trade dispute. Thirdly, it will be noticed that the section says the Act shall not be actionable on the ground *only* that it induces some other persons, etc., and the words "on the ground only" have been construed to impose a limitation in the protection.

We will first proceed to consider the words "in contemplation or furtherance of a trade dispute," without which the section does not apply. These words were first discussed in the case of Conway *v.* Wade.[2] In that case a workman brought an action for damages for inducing the plaintiff's employers to dismiss him by threat that otherwise the union men would cease working and the jury found that no trade dispute existed or

[1] [1920] 2 Ch. 364, at p. 371. [2] [1909] A.C. 506.

was contemplated by the men and that the defendants' threats were to force the plaintiff to pay the union fine and to prevent him getting employment. The defendants raised the defence of a trade dispute which the jury disbelieved and the matter came before the House of Lords. Lord Loreburn, at page 509, points out, in discussing the words, "in contemplation or furtherance of a trade dispute," that they appear in the Conspiracy and Protection of Property Act, 1875. "I think," he said, "they mean either a dispute is pending and the act is done in extension and with a view to add support, or the dispute is already existing and the act is done in support of one side. If, however, a trade dispute was used as a cloak, a jury would be entirely justified in finding that what it did was in contemplation or furtherance of his own designs; sectarian, political or purely selfish as the case may be, these words do import in some sense mere motive, and in the case I have cited a quite different motive would be present."

Lord Atkinson, at page 517, says, "It is help, assistance, or encouragement to such a dispute that the legislature apparently had in view when it used the words 'in furtherance.' Must it not, when it uses in juxtaposition with these words the words 'in contemplation,' be held to have had in view a dispute which must, at the time the Act is designed to protect was done, have been at all events 'thought of' by some person who should be a party to it when it arose." He also thinks that an intruder or mischief-maker is not

protected, and Lord Shaw (p. 522) says that to contemplate a trade dispute must be the contemplation of something impending or likely to occur, and they do not cover the case of coercive interference in which the intervener may have in his own mind that if he does not get his own way he will thereupon take ways and means to bring a trade dispute into existence. In Larkin *v.* Long,[1] Lord Parmoor says the governing words of the section are in furtherance or contemplation, but even if a defendant succeeds in bringing himself within these words he has next to satisfy the court that there is in existence a trade dispute.

The term "Trade dispute" is defined in the Act as follows by section 5 (3):

"In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'Trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression 'workman' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises; and in section 3 of the last mentioned Act the words 'between employers and workmen' shall be repealed."

A trade dispute does not necessarily mean a dispute between an employer and his own men,[2] but within the scope of the section, the question

[1] [1915] A.C. 814, at p. 845. [2] Dallimore *v.* Williams (1912), 29 T.L.R. 67.

whether there is a trade dispute or not is a question of fact.[1] A difficult question has arisen as to the scope of the words "trade dispute," more particularly in connection with a dispute between workmen and workmen as to whether an individual workman should join one trade union or another. In the case of Valentine *v.* Hyde,[2] Mr. Justice Astbury held that such a dispute was not a dispute within the meaning of the Trades Disputes Act, on the ground that it could not be said that, if a majority of workmen threatened a minority that unless they joined some political or religious body patronized by the majority, they could get the minority deposed from their employment; that would not be a dispute connected with the employment or non-employment of any person, and he held that a similar proposition would be true that applied to the question as to whether the men should join one trade union or another. In other words he read the word "directly" into the section before the words employed or not employed, and held that the dispute as to trade unionism was not one directly connected with the employment. It is true that in the case of Gaskell *v.* Lancashire Miners' Association[3] it was held that the words "Trade dispute" applied to a dispute similar to that in Valentine *v.* Hyde, but Mr. Justice Astbury said that the case was so obscurely reported that it was difficult to say what was pleaded and what was proved, and in any case he thought that the employers were parties to the dispute.

[1] White *v.* Riley, [1921] 1 Ch. 1. [2] [1919] 2 Ch. 129. [3] 28 T.L.R. 518.

Hodges *v.* Webb[1] was also a case of dispute as to whether a man should join one trade union or another, but Mr. Justice Peterson held on the facts that the employers were concerned, and it was not a dispute simply between workmen, but the learned judge goes on to comment on Mr. Justice Astbury's views saying that a dispute between non-unionists and unionists would also not be a trade dispute within the meaning of Valentine *v.* Hyde, and asked what, on the view expressed in Valentine *v.* Hyde, would be a dispute between workmen and workmen?

The matter was next considered in the Court of Appeal in the case of White *v.* Riley,[2] which was an appeal from Mr. Justice Astbury from a decision where the facts were very similar to those in Valentine *v.* Hyde. The Court of Appeal held that there was no unlawful act done at common law and, therefore, their observations on the Trades Disputes Act, 1906, are in a sense *obiter*, but Lord Justice Warrington said that the question whether there was or was not a trade dispute between workmen and workmen was a question of fact in every case, and the learned judge treated the case as one of a dispute whether the plaintiff should join a union; it was really a dispute as to the terms on which he should continue in his employment. He preferred the reasoning of Mr. Justice Peterson in Hodges *v.* Webb to that of Valentine's case. The Master of the Rolls and Lord Justice Younger concurred, and, consequently, it would now appear

[1] [1920] 2 Ch. 70. [2] [1920].

to be the law that even where a common law tort is committed, depriving a man of his employment, such an act is done in contemplation or furtherance of a trade dispute if the dispute is whether he should join one trade union or another and is not actionable, but the Court of Appeal have abstained, perhaps wisely, from saying whether a dispute centering round whether he should join or leave a political or religious organization is or is not a trade dispute within the Trades Disputes Act.

One other matter on the construction of section 3 of the Trades Disputes Act remains to be considered. Under section 3 a person procuring a breach of contract or interfering with the right of another to dispose of his labour as he wills is protected *only* when the only ground urged against is that it does those things and no other unlawful act. In Conway *v.* Wade,[1] Lord Loreburn says that the protection does not apply where there is threat or violence, and Mr. Justice Astbury, in Valentine *v.* Hyde, says that these words are really limitations of significant importance. On this matter, while Mr. Justice Peterson disagrees with Mr. Justice Astbury as to what does constitute a threat, he is practically in agreement with him that where there be threat or coercion the Trades Disputes Act does not apply,[2] and this view is not disturbed by anything which the Court of Appeal have said in White *v.* Riley.

There has recently arisen for consideration the question how far a strike called for political objects—"direct action," as the journalists have called it—

[1] [1909] A.C. 506. [2] Hodges *v.* Webb [1920], 2 Ch. 70, at p. 87.

that is a strike to interfere with or constrain the Government in conduct which the trade unions do not approve, can be said to be a strike in contemplation or furtherance of a trade dispute. This matter has fortunately not yet had to be decided, but I have very little doubt that such a strike would not be covered by the words in the definition in the Trades Disputes Act.

§ 3.—TORTIOUS ACTS.

Although the effect of this recent decision is, on the whole, to whittle down the still existing common law, it is nevertheless still necessary to consider the common law apart altogether from the Statute of 1906.

The leading authority on this matter is the case of Lumley *v.* Gye,[1] though a writ in trespass on the case for seducing away the servant of another is to be found as early as the reign of Edward III.[2] In Lumley *v.* Gye the lessee of a theatre induced a Miss Wagner not to sing at the plaintiff's theatre where she had a contract, and it was held that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain whether the employment is in existence or is only *in fieri*, provided the procurement be during the existence of the contract and produces damages. There are remarkably few authorities cited in the judgment, but the general action is no doubt based upon the common law doctrine of seduction. In Winsmore

[1] (1853) 2 E. and B. 217. [2] See the Year Books 47 Edw. III, Michaelmas Pl. 15; 2 Henry IV, Michaelmas Pl. 47, per Moyle. J. Year Book 9 Edw. IV, Michaelmas 4.

v. Greenbank,[1] it was decided that to procure a violation of a plaintiff's right under a marriage contract was an actionable wrong. Birall *v.* Randall[2] is another case of a similar nature, but we may base our present view of the law on the case of Lumley *v.* Gye, which has been upheld ever since and was subsequently approved by the House of Lords in the case of Quinn *v.* Leathem,[3] and it is now clear that any kind of contract is included, and includes one of master and servant.[4] There must, however, be a real intended procurement of the breach of contract. An action which may possibly result in a procurement of breach of contract may not be enough.[5] An official of a union who calls men out in a breach of contract of which he is ignorant may not be personally liable.[6]

We pass next to the very difficult question of interference with the right of persons to dispose of their labour as they will, which is not achieved by the procurement of a breach of contract. We may say with assurance that an act in itself legal does not become actionable merely because it interferes with another in his trade,[7] nor will bad motive in itself create a liability,[8] but where there are unlawful means employed it is otherwise, and we therefore have to consider what kind of acts constitute unlawful means. In many

[1] Willes 577. [2] 3 Berr. 145. [3] See also Bowen *v.* Hall, 6 Q.B.D. 333. [4] National Phonograph Company *v.* Bell [1908], 1 Ch. 335. [5] See Wolstenholme *v.* Amalgamated Musicians' Union [1920] 2 Ch. 388; White *v.* Riley [1921] 1 Ch. 1. [6] [1909] 1 K.B.D. 310, at pp. 332, 341; Walters *v.* Green [1899] 2 Ch. 696, 703. [7] Allen *v.* Flood [1898], A.C. 1, at p. 140, per Lord Herschell. [8] Allen *v.* Flood, *ibid.*, per Lord Watson, p. 92.

cases there can be little difficulty in answering such a question. Violence or threats are clearly unlawful. Fraud, misrepresentation, intimidation, and obstruction or molestation may be unlawful whether the means used be physical or moral. It is scarcely necessary now to discuss the cases earlier than that of Allen *v.* Flood, at least at all closely. They are not, for the most part, cases of conspiracy, but cases of direct interference of one man with another's right to carry on his calling, such for example as Garrett *v.* Taylor,[1] where there were threats of personal violence; Tarleton *v.* M'Gawley, where cannon were fired at negroes to prevent them trading with a rival,[2] or where there were threats of nuisance as in Lyons *v.* Wilkins,[3] or fraud as in the case of National Phonograph Co. *v.* Bell.[4]

The modern law on the question of conspiracy really begins with the famous case of the Mogul Steamship Co. *v.* McGregor,[5] in which a number of owners of ships, in order to procure a trade for themselves, formed an association and agreed that their conditions of trade should be mutually agreed and that their agents should be prohibited from acting for competing shipowners. The plaintiffs were shipowners outside the association and endeavoured to obtain cargoes, but the association underbid them and threatened to dismiss agents who loaded the plaintiffs' ships. The plaintiffs then brought an action for conspiracy. They relied upon Hilton *v.*

[1] (1620) Cro. Jac. 567. [2] (1794) 1 Peake 270; Keeble *v.* Hickeringill (1706), East 574, note. [3] [1899] 1 Ch. 255. [4] [1908] 1 Ch. 335. [5] [1892] A.C. 25.

Eckersley,[1] and said that the act was analogous to that of procuring a breach of contract and also cited the dictum in Hawkins' *Pleas of the Crown* and the criminal cases of Duffield and Bunn.[2] The House of Lords took the view that the action was not well founded. As between the members of the association, they agreed that the rules were probably in restraint of trade, but they adopted the view expressed by Lord Justice Bowen in the court below,[3] that the intention of the association was not primarily "to injure another but to protect their own trade or interest," and that would be a justification, having regard to the facts. This case definitely disposes of the view of Crompton J. in Hilton *v.* Eckersley that such an association would necessarily be a criminal conspiracy, but, on the facts, it is difficult to see how the prevention of agents not to ship the plaintiff's cargoes was not an intentional act to do him injury.

We pass next to the case of Allen *v.* Flood.[4] In that case the question of conspiracy did not arise. The appellant Allen was a delegate of the union. He was sent for by the employers and he told them that the men would leave off working unless the respondents were dismissed. The dispute was as to whether the men should join one trade union or another, and, after consultation with the judges, the House of Lords, by a majority, came to the conclusion that the act done by Allen was not actionable. Lord Halsbury (page 75) distinguishes this case and that of Mogul by saying that

[1] 6 E. and B. 47. [2] 5 and 12 Cox C.C. [3] 23 Q.B.D. 596, at p. 618. [4] [1898] A.C. 1.

in this case there was an intention to do that which was calculated in the ordinary course of events to damage, whereas in Mogul's case the injury was only the consequence of a legitimate act. But, on the facts, the mere notification that there would be a strike conveyed by Allen seems to be far less intentionally injurious than the deliberate penalizing of agents in the Mogul case. The conclusion one is driven to with regard to these two cases is that the distinction really depends upon the facts, and the test as to the legality or not really becomes one of motive as to whether the act is done with intention to injure or not.

Temperton *v.* Russell[1] must next be considered. There, in order to force other employers to break their contract and not to enter into contracts with the plaintiffs, the defendants threatened these other employers that they would withdraw their workmen if they went on working with the plaintiff. We need not consider very closely the question of procuring breaches of contract, but as regards the attempts to prevent future contracts being made, Lord Esher thought that it was an actionable conspiracy to coerce and that no distinction could be made between the procuring of the breach of contract and, as he found, the malicious combination to prevent contracts being made; in other words, he finds here a malicious motive though how the case on the facts is really distinguishable from that of Mogul's case, where Lord Hannen said the real object was not to injure, it is difficult to see. We come next to the case of

[1] (1893) 1 Q.B. 715.

Quinn *v.* Leathem.[1] It will be remembered how in the Mogul case motive was thought to be material, and how, in Allen *v.* Flood, where there was no combination, malice was held not to supply a case for action. In Quinn *v.* Leathem there are findings both of combination and malice. As regards malice, this case is also not easily distinguishable from that of Mogul, nor is it easy to understand how, in Allen *v.* Flood, it could be said that an act done which does not amount to a legal injury cannot be actionable because it is done with a bad intent is reconcilable with the insistence on the intent which occurs and forms the substance of the Mogul case. One is driven to the conclusion that the only difference is to be found in the fact of conspiracy in Quinn *v.* Leathem which was absent in Allen *v.* Flood. This distinction is, however, by no means satisfactory. Lord Lindley[2] says that numbers may force and coerce where one may not, and that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy or with conspiracy becomes dangerous and alarming.[3] Lord Lindley says that, as a matter of fact, a combination may produce an unlawful thing which an individual is not able to achieve. This is unobjectionable in itself, but if it is meant that the act of combination in itself produces elements of illegality which are never present in the case of one individual, it is difficult to find authority for this view, and the judgment of Lord Justice Romer in

[1] [1901] A.C. 495. [2] Page 538. [3] See Gregory *v.* Duke of Brunswick (1844) 6 M. & G. 205, 953.

Giblans' case,[1] that a powerful official may be a more potent force than a combination of workmen, cannot be gainsaid. It is easy to distinguish Quinn *v.* Leathem from Allen *v.* Flood on the facts, because in Quinn *v.* Leathem there was clearly a deliberate intention to injure. The difficult question arises from the fact that in Allen *v.* Flood it was clearly said that motive was not material, in which case the intention to injure in Quinn *v.* Leathem was not material either, and that otherwise on the facts, Quinn *v.* Leathem is scarcely distinguishable from the Mogul case, for, in both cases, the ultimate object was the benefit of the association in question, and the injury to another was ancillary to that purpose. It will be found that since this time the courts have inclined sometimes to one view and sometimes to another. Thus Giblans' case may be accounted for on the Quinn *v.* Leathem rule. So also Mr. Justice McCardie, in his recent decision in Pratt *v.* British Medical Association,[2] says in terms that a wide definition should be given to the word threat, and he said in that case, to declare that a member of an association would be expelled if he consulted with a doctor who had quarrelled with the Association was an illegal act. A view directly in opposition to that of Mr. Justice Eve in Wolstenholme *v.* Amalgamated Musicians' Union,[3] where he held that for an association to tell a conductor that if he employed a dissentient member of a trade union he, the conductor, would be expelled was a lawful act on the part of the society.

[1] [1903] 2 K.B. 619. [2] [1919] 1 K.B. 244. [3] [1920] 2 Ch. 388.

Valentine *v.* Hyde and White *v.* Riley in the lower court both followed the rule in Quinn *v.* Leathem, while Hodges *v.* Webb, Davies *v.* Thomas,[1] White *v.* Riley, and Ware *v.* Motor Trades Association[2] in the Court of Appeal, accept the view laid down in the case of Allen *v.* Flood.

I have spoken of Giblans' case[3] which really extends the finding of intention to injure in Quinn *v.* Leathem to a single powerful official without any question of conspiracy, but in the Glamorgan Company's case the question of justification of trade interest laid down in Mogul's case was held on the facts in the House of Lords not to apply where miners struck in order solely to keep up the price of coal. The case is one of breach of contract, but it appears that it was accepted that justification might excuse even such a breach. If the distinction between the protection of trade interests in this case and in Mogul rests upon the fact that in the former there was no breach of contract it is intelligible, but otherwise the intention to injure in the case of Mogul was much stronger that in the Glamorgan case,[4] where there was no malice found.

In Read *v.* Stonemasons' Society,[5] there was similarly a breach of contract and so also in Smithies *v.* the Plasterers' Union,[6] but the difficulty is that, in no case is there any suggestion that a higher degree of justification is necessary in cases of breaches of contract than in cases of oppressive combination, and, if this be so on the facts, the same

[1] [1920], 2 Ch. 109. [2] (1920) 37 T.L.R. 213. [3] [1903] 2 K.B.D. 600. [4] [1905] A.C. 239. [5] [1902] 2 K.B.D. 88. [6] [1909] 1 K.B.D. 30, 310.

trade interests appear to apply as much in these trade union cases as in Mogul.

It is with the greatest diffidence that I shall endeavour to sum up the effect of all these cases. If motive is material, then the argument that men have the right to tell an employer that they will leave their work unless an objectionable person is dismissed, whether they do it collectively or whether an official threatens it on their behalf, is not conclusive. There remains the question whether they know in fact that the employer cannot dispense with their services, in which case they really do not mean to leave their work at all, but to force the employer's hand by threatening to injure his property by withdrawing their labour as much as if they had threatened to burn down his works, and this is the view undoubtedly held by Mr. Justice Astbury and Mr. Justice McCardie. Against this view is presented the opinion that motive is immaterial, at least so I read the underlying assumptions of Mr. Justice Peterson in Hodges *v.* Webb, Mr. Justice Eve in Wolstenholme's case, and Mr. Justice P. O. Lawrence in Green *v.* Williams, not reported, and the Court of Appeal in White *v.* Riley, Davis *v.* Thomas, and Ware *v.* Motor Trades Association.

There are really three possible solutions of this difficulty, the first denies the right in combination to withdraw labour at all; this is the discredited opinion of Mr. Justice Crompton in Hilton *v.* Eckersley and of other early Victorian cases. At the opposite end is the unqualified affirmation of this right to withdraw labour expressed in White

v. Riley in the Court of Appeal. Midway between the two is the regard to the intention disclosed in the Mogul case and in Quinn *v.* Leathem, and, if Allen *v.* Flood was decided, as was said in Quinn *v.* Leathem, solely on the facts that there was a mere warning by an official, it seems that there is authority in the House of Lords for the contention that intention is of the gist of the action.

Under these circumstances it is perhaps fortunate the Trades Disputes Act has made so many of these discussions academic, as otherwise the responsibility of counsel in advising in this type of case would be almost insuperable. It is hoped that the day will come when either the whole of the law will be reduced to a clearer statutory form or that the House of Lords will be pleased to lay down a ruling as to the circumstances in which the registered trade union and other similar associations and their officials may, with impunity, order, persuade or force their members not to work with persons of whom they disapprove, and when such actions are to be held to be unlawful.

LECTURE III.—LEGAL STATUS.

§ 1.—The Problem of Incorporation.

It will be remembered that the Trade Union Act of 1871, in addition to legalizing the purposes of a trade union, provided for certain changes in the constitution of such bodies. The power to register a trade union, which is given by the later sections of that Act, is entirely optional, and registration of a trade union differs in this respect from the registration of a limited company in that its fundamental status as voluntary society is not affected by registration. The definition of a trade union, which is contained in the Trade Union Act of 1913, applies equally to a trade union which is registered and to one which is not registered, and, at any rate, since 1913, a trade union has become a body specifically defined by statute, and any combination which does not fall within the definition therein contained is not a trade union.

The purposes of the Trade Union Act, 1913, and the mischief to which it is addressed, are easily understood if we trace the history of the litigation which led to its passing.

The problem before the courts which arose quite late in the history of our subject and resulted in the 1913 statute, was concerned with the scope of the powers of trade unions. Before 1871 there existed no statutory definition of a trade union at all; the real question before the Courts was whether the society was or was not in restraint of trade.

These matters, it will be remembered, had been discussed in such cases as Hilton *v.* Eckersley[1] and Hornby *v.* Close,[2] and no doubt the definition which appeared in the Acts of 1871 and of 1876 made specific what had been implicit in earlier judgments. The Acts of 1871 and 1876, it will be remembered, defined a trade union as "any combination whether temporary or permanent, for regulating the relations between workmen and masters or between workmen or masters or for imposing restrictive conditions on the conduct of any trade or business," but, as Lord Justice Fletcher Moulton said in the Osborne case,[3] the legislature did not create the name for the purpose of the Trade Union Acts. It was at the time a well-known form connoting combinations of a known type formed for objects and purposes which were well recognized. The only two additional matters imported by Statute were the definition of the combination for imposing restrictive conditions and the inclusion of societies not as a whole in restraint of trade. The terms of the definition are very wide, so that to show that a combination is not a trade union it is insufficient to show that the regulations imposing restrictive conditions on the trade are only such as are necessary to secure beneficial results.[4] A trading association which fixes the rate at which federated bodies may charge is thus a trade union. Chamberlains Wharf Ltd. *v.* Smith[5] so also a society imposing restrictions on federated bodies

[1] (1857) 6 E. and B. 47. [2] (1867) 2 Q.B.D. 153. [3] [1909] 1 Ch. 163, at p. 184. [4] Per Lord Moncreiff in the Edinburgh and District Water Manufacturers' Defence Association Ltd. *v.* Jenkinson (1903), 5 F. 1,159, at p. 1,163. [5] [1900] 2 Ch. 605.

as to the employment of persons may be a trade union.[1]

These cases, however, decide only that a body which relies on functions which are defined as such in the Trade Union Acts is a trade union. They leave open the more difficult question as to whether a body, which is admittedly a trade union, can spend money or do acts which are not mentioned specifically in the Trade Union Acts. This question first came before the courts in the case of Steele *v.* South Wales Miners' Federation.[2] The defendant union had as one of its objects the power to provide funds wherewith to pay the expenses of returning and maintaining representatives to Parliament. A resolution was carried approving this object and a member objected to paying the contribution. The Divisional Court, however, treated the case as one solely of administrative jurisdiction and, in the opinion of Mr. Justice Darling, the definition of a trade union was not intended to be exhaustive or to prevent the association from lawfully doing other acts beyond those mentioned. He points out that the section is silent about providing benefits for members and that, in any event, he thought that the promotion of laws passed by Parliament might be a means of regulating the relations between masters and workmen. Mr. Justice Phillimore agreed and the appeal was dismissed, but, in the case of Osborne *v.* Amalgamated Society of Railway Servants,[3] the same matter was again litigated with different results

[1] Mineral Water Bottle Exchange and Trade Protection Society *v.* Booth (1887), 36 Ch.D. 465. [2] [1907] 1 K.B.D. 361. [3] [1909] 1 Ch.D. 163.

and Steele's case definitely overruled. Mr. Justice Neville considered himself bound by the decision in Steele's case, but the Court of Appeal took a different view. Lord Justice Cozens-Hardy points out in the first place that the Court in Steele's case was much influenced by the omission of any reference of benefits in the definition, but he points out that the 1871 Act itself deals with the provision of benefits in terms; this view he gets from section 4 and the first schedule, but he goes on to say that the definition is a limiting and restrictive one and in his opinion it was not competent to a trade union to add to its objects something so wholly distinct from the objects contemplated by the Trade Union Acts as to entertain a provision to secure political representation. His views, it must be confessed, are based rather on moral and social considerations than on any legal principle, nor do the views which were subsequently expressed in the House of Lords find any very clear enunciation in the judgments of Lord Justice Farwell or Lord Justice Fletcher Moulton.

When, however, we turn to the House of Lords,[1] we find the matter is argued far more closely on a basis of legal principle. Lord Halsbury says that the Trade Union Act of 1871 is as it were the charter of incorporation, and thinks that the doctrine of *ultra vires* applies as in the case of a trading corporation, a matter recognized and discussed in the case of Ashbury Railway Co. *v.* Rich.[2] What is not within the statute, he says, is prohibited both to a corporation and a company.

[1] [1910] A.C. 87. [2] L.R. 7 H.L. 653.

The trade union only exists as a legalized combination having power to enforce its rules within the limitations of the statute whatever those limitations may be. Lord Macnaghten is more analytical. He points out that the doctrine of *ultra vires* applies with equal force in every case where a society is formed for purposes recognized and defined by Act of Parliament by some statutory privilege, and, he says, that Parliamentary power was only exercised by trade unions after the Act of 1871, though this view is historically incorrect. A trade union is likened to commissioners of sewers who are not incorporated, and so while a trade union is held not to be a corporation, the doctrine of *ultra vires* is applied to it, and, in the words of Lord Atkinson, the test whether a union has or has not a specific power under the statute depends upon the answer to the question, Does the power merely provide a method of conducting business, or is it a power making the society a thing different from that which is specified in the Act and mentioned by the Act? In Linaker *v.* Pilcher,[1] Matthew J. had decided that a trade union could carry on a newspaper, but this is clearly not an ancillary power under the Act of 1871, and must, therefore, be regarded as having been overruled in the case of Osborne.

The position of the unregistered trade union in relation to the doctrine of *ultra vires* is somewhat difficult, so far as the House of Lords is concerned. Lord Macnaghten appears to limit the *ultra vires* doctrine to a registered

[1] [1901] 84 L.T. 421.

trade union, though Lord Halsbury applied it generally. In Wilson *v.* Scottish Typographical Association,[1] Lord Skerrington says that the doctrine of *ultra vires* could have no application to a society which had no such constitution such as an unregistered trade union, but, on appeal, the injunction was granted, though not apparently on the ground of *ultra vires*, but on the ground that a society unregistered could not alter its whole constitution without the consent of all the members. Thus the position of an unregistered trade union remains obscure so far as regards the application of the *ultra vires* doctrine. In Wilson *v.* Amalgamated Society of Engineers the Osborne principle was applied to municipal as distinct from Parliamentary representation.[2] There are considerations which were not considered at all in the House of Lords; thus it appears to have been assumed throughout that a trade union is necessarily unlawful at common law, but, curiously enough, in the next year the Court of Appeal decided that the defendant union in Osborne's case was not so unlawful, and in those circumstances it is difficult to see how it could have depended for its legality on the Trade Union Acts in the manner in which the House of Lords assumed that it did. No tribunal, and, so far as I know, no commentator has ever analysed this paradox.

§ 2.—POLITICAL ACTION.

In 1913 a large part of the effect of the judgment in the Osborne case was removed by the Trade Union Act of that year.

[1] (1911) 1 S.L.T. 253. [2] [1911] 2 Ch. 324.

The definition of a trade union has been amplified and its powers considerably extended by the Trade Union Act, 1913. A trade union is there defined, for the purposes of the Trade Union Acts, as any combination, whether temporary or permanent, the principal objects of which are:

(*a*) The regulation of the relations between workmen and masters; or

(*b*) Between workmen and workmen; or

(*c*) Between masters and masters; or

(*d*) The imposing of restrictive conditions on the conduct of any trade or business; or

(*e*) The provision of benefits to members; all of which are described in the Act as "statutory objects."[1] The statutory addition of object (*e*) was held by Lord Atkinson in Osborne's case[2] to be covered by definition (*b*); object (*d*) was added by the Act of 1876; the remaining objects were in the original definition of the 1871 Act.

A combination, so long as it is registered under the Trade Union Acts, is deemed to be a trade union whether it has such "statutory" objects under its constitution or not. An unregistered combination certified as a trade union by the Registrar similarly remains a trade union so long as the certificate is in force, but an unregistered and uncertified combination, in order to bring itself within the definition of a trade union, must show that its principal objects are "statutory." Though a combination has under its constitution objects or powers other than statutory objects, still, provided

[1] Trade Union Act, 1913, ss. 2 (1). [2] [1910] A.C. at p.102.

its principal objects are statutory ones, it is a trade union. A combination with rules *ultra vires* may nevertheless be a trade union.[1]

The objects which a trade union may pursue are no longer restricted to the "statutory objects," but extend (subject to special provisions as to the furtherance of political objects) to such other lawful objects as may be authorized by its rules, and a trade union may now apply its funds for any lawful objects or purposes for the time being authorized under its constitution.[1]

A trade union, consequently, may carry on a trade or newspaper, objects formerly held to be *ultra vires*. Such ancillary objects, therefore, are lawful objects for a trade union to pursue, provided that the principal objects of the trade union are statutory ones; though, as in the absence of statutory objects the combination is not a trade union, it is doubtful if, in such case, the doctrine of *ultra vires* will attach to it at all, but in such a case the combination could not avail itself of the protection of the Trade Union Acts.

§ 3.—Political Objects.

No trade union may apply its funds directly or indirectly in furtherance of the following political objects.

(*a*) The payment of any expenses incurred at any time either directly or indirectly by any candidate or prospective candidate for election to Parliament or to any public office; "Public office" means the office of member of any public body

[1] Trade Union Act, 1913, s. 1 (1).

who have power to raise money either directly or indirectly by means of a rate,[1] or

(*b*) The holding of any meeting or distribution of literature or documents in support of any candidate or prospective candidate; or

(*c*) The maintenance of any member of Parliament or any person holding a public office; or

(*d*) The registration of electors or the selection of a candidate for Parliament or any public office; or

(*e*) The holding of political meetings of any kind or the distribution of political literature or documents (except where the main purpose of such meetings or distribution is the furtherance of statutory objects).[2]

Unless (I) the furtherance of such political objects has been approved as an object of the union by a resolution passed on a majority ballot of the members of the union.[3] The resolution takes effect as if it were a rule of the union and as such may be rescinded.[4]

On the adoption of the resolution, notice must be given to the members of the union, informing them that each member has a right to be exempt from contributing to the political fund, and that a form of exemption notice can be obtained by or on behalf of a member either by application at, or by post from, the head office or any branch office of the union or at the office of the Registrar. This notice to members must be given in accord-

[1] Trade Union Act, 1913, s. 3 (3). [2] See Lords Debates (Hansard), Feb., 1913. [3] Trade Union Act 1913, s. 3 (1). [4] *Ibid.*, s. 3 (4).

ance with the rules of the union approved for the purpose by the Registrar, who will have regard in each case to the existing practice and to the character of the union.

When the provision as to the application of the funds of a union for political purposes have been complied with, such powers extend to a union which is in whole or in part a combination of other unions as if the members of that union were the individual members of the component unions and not of the separate unions; and such component union may collect from any of its members contributions to the political fund of the combination.[1]

The ballot must be taken in accordance with the rules of the union, to be approved for the purpose by the Registrar, but the Registrar must not approve any such rules unless he is satisfied that every member has an equal right and, if reasonably possible, a fair opportunity of voting, and that the secrecy of the ballot is properly secured, and unless

(II) Rules, to be approved by the Registrar, are in force providing:—

(*a*) That any payments in the furtherance of the political objects are to be made out of a separate political fund, and for the exemption of any member of the union from any obligation to contribute to such a fund if he gives notice in accordance with the Act that he objects to contribute. A member of a trade union giving notice that he objects to contribute, so long as his notice is not

[1] Trade Union Act, 1913, s. 3 (5).

withdrawn, remains exempt from contributing to the political fund of the union as from the first day of January next after the notice is given, or, in the case of a notice given within one month after the notice given to members of the adoption of a resolution approving the furtherance of political objects, as from the date on which the member's notice is given.[1]

Effect may be given to the exemption of members to contribute to the political fund of a union either:

(1) by a separate levy of contributions to that fund from the members of the union who are not exempt, or

(2) by relieving any members who are exempt from the payment of the whole or any part of any periodical contributions required from the members of the union towards the expenses of the union. The rules must provide (*a*) that relief shall be given as far as possible to all members who are exempt on the occasion of the same periodical payment, and (*b*) for enabling members to know if any part of the periodical contribution is to be used for the political fund.[2] A question arises as to the position when the union paid the political expenses out of interest accruing from the general fund.

A member who is exempt from the obligation to contribute to the political fund of the union is not to be excluded from any benefits of the union, or placed in any respect at any disadvantage as compared with other members of the

[1] Trade Union Act, 1913, s. 5 (2). [2] *Ibid.* s. 6.

union, except in relation to the control or management of the political fund, by reason of his being so exempt, and that contribution to the political fund of the union shall not be made a condition for admission to a union.

The Trade Union Act, 1913, alters the legal status of a trade union to some extent. By section 2 (2), it is provided that the Registrar of Friendly Societies shall not register any combination as a trade union, unless, in his opinion, having regard to the constitution of the combination, the principal objects of the combination are statutory objects, and he may withdraw the certificate of registration of any such registered trade union if the constitution of the union has been altered in such a manner that, in his opinion, the principal objects of the union are no longer statutory objects, or if in his opinion the principal objects for which the union is actually carried on are not statutory objects.

Any unregistered union may, if they think fit, at any time without registering the union apply to the Registrar of Friendly Societies for a certificate that the union is a trade union within the meaning of this Act, and the Registrar, if satisfied, having regard to the constitution of the union and the mode in which the union is being carried on, that the principal objects of the union are statutory objects, and that the union is actually carried on for those objects, shall grant such a certificate, but the Registrar may, on an application made by any person to him for the purpose, withdraw any such certificate if satisfied, after

giving the union an opportunity of being heard, that the certificate is no longer justified. This section appears to assure that the trade union is already in existence at the time when the application to certify is made.

Any person aggrieved by any refusal of the Registrar to register a combination as a trade union, or to give a certificate that an unregistered trade union is a trade union within the meaning of this Act, or by the withdrawal under this section of a certificate of registration, or of a certificate that an unregistered union is a trade union within the meaning of this Act, may appeal to the High Court, or in Scotland to the Court of Session, within the time and in the manner and on the conditions directed by rules of court. Rules have been made.

A certificate of the Registrar that a trade union is a trade union within the meaning of this Act is, so long as it is in force, conclusive for all purposes.

A trade union may become an approved society under the National Insurance Acts, and also provide benefit under the Unemployment Insurance Acts; it may also undertake insurance business if it complies with the requirements of the Assurance Companies Acts.

The Trade Union Act, 1871, makes the registration of a trade union optional, but the legality of a trade union is little affected by the fact that it is unregistered. Special rights, however, are given to trade unions by the Acts of 1871, 1876 and 1913 which register themselves. Registered

trade unions may purchase or take upon lease land not exceeding one acre. The property of the trade union becomes vested in trustees, and actions may be brought by or against the trustees with regard to such property. The treasurer is compelled to account on demand to the trustees or members for moneys passing through his hands, and penalties may be exacted by such registered union against members who have misapplied the property of the union or their representatives.

Any seven or more members of a trade union may register their trade union by subscribing their names to the rules of the union and otherwise complying with the provisions of the Trade Union Acts and the regulations made under those Acts with respect to registration. Unless the rules provide to the contrary, any person over the age of sixteen may be a member of a trade union, and is therefore competent to subscribe. But if the Registrar has reason to believe that the applicants have not been duly authorized by the trade union to make the application, he may require evidence from them to that effect.

The Acts of 1871 and 1876 prescribe the duties and rights attaching to registered trade unions; in various sections they provide as follows: The Home Secretary (in Scotland the Secretary for Scotland) has power to make regulations respecting registration and respecting the seal (if any) and the forms to be used for the purpose of registration. He may make regulations respecting the inspection of documents kept by the Registrar and the fees (if any) to be paid on registration, but such

fees must not exceed the sum of £1 for registration and 2s. 6d. for inspection of documents. The fee of £1 is the fee fixed by the Secretary of State for the certificate of registration of a trade union.

While the Secretary of State may make general regulations, the fact that he or his deputy is satisfied that his requirements have been carried out will not necessarily validate the proceedings of the union in seeking registration. In Osborne *v.* Amalgamated Society of Railway Servants, Lord Justice Fletcher Moulton said: "It is true that by the provisions of section 13 (6) of the Act of 1871, under regulations made by the Home Secretary, power is given to any seven members of the union to apply for the registration of alterations of rules. But there is not in the sub-section authorizing the making of these rules anything which would entitle the Home Secretary to interfere with the provisions of the Act or the rules of a trade union with regard to the proceedings necessary to give validity to an alteration."

This observation is equally true in the case of rules made at the time of registration. The certificate of the Registrar affirming due compliance with the regulations made by the Secretary of State is therefore not conclusive as to the validity of such proceedings.

The Act of 1871 also provides that if any of the purposes of the trade union, which it is sought to register, are unlawful, the registration is void, and the Registrar, on his being satisfied that any of the

purposes of the trade union have become unlawful, must cancel the certificate of registration, no notice to the trade union to that effect being required. On proof to the satisfaction of the Registrar, either that the certificate was obtained by fraud or mistake; or that the trade union has, after notice from the Registrar, wilfully violated any of the provisions of the Trade Union Acts, the Registrar may cancel the certificate. Before the certificate is actually cancelled, not less than two months' notice in writing (on a prescribed form), specifying the grounds of the proposed withdrawal or cancellation, must be given by the Registrar to the trade union. A trade union, whose certificate of registration has been withdrawn or cancelled, ceases absolutely, from the time of such withdrawal or cancellation, to enjoy, as such, the privileges of a registered trade union, but it is nevertheless exposed to any liability which may be enforced against it as if such withdrawal or cancellation had not taken place.

The Registrar's duties are ministerial and not judicial. In R. *v.* The Registrar of Friendly Societies,[1] each of two sections of a trade union applied to register by the name which the original society had always borne. The Registrar heard evidence from each side, and, finding that there was a *bonâ fide* dispute, refused to register the trade union at all until the decision of the Court should determine the legal position of the parties. The Registrar's refusal was approved. Blackburn, J., said: "The effect of registering either section

[1] (1872) 7 Q.B. 741.

of the society by the name claimed by both would be virtually to give that section the control of the funds of the society. I think the Registrar, as soon as he found each body of persons claiming as against one another a large sum of money, was bound to say, 'I won't alter the position of the parties, or do anything by registering one set of applicants which may prejudice the others.' "[1]

Every registered trade union must have a registered office, for the reception of communications and notices. If any trade union is in operation for seven days without having such an office, such trade union and every officer thereof incurs a penalty not exceeding £5 for every day during which the union is in operation. Notice of the situation of the office and of any change thereof must be given (on a prescribed form) to the Registrar and must be recorded by him; and, until such notice is given, the trade union has not complied with the conditions of registration. The removal of the registered office of a trade union from one country (i.e., England and Wales, or Scotland or Ireland) to another does not render re-registration of the union necessary.[2]

Trade unions carrying on or intending to carry on business in more than one such country must be registered in the country in which their registered office is situate. All matters requiring registration must be registered with, and returns and notices must be sent to the registrar of the country in which the trade union is situate. Copies of

[1] *Ibid.*, p. 744. [2] Trade Union Act, 1871, s. 15, etc. Trade Union Act (Amendment) Act, 1876, s. 6.

such returns and notices are sufficient, when required, for other countries.

In addition to having an office, a trade union desiring registration must have and register rules. In the case of unions carrying on or intending to carry on business in more than one country, copies of the rules, and of all amendments of the same, must, when registered, be sent to the registrar of each of the other countries in which the trade union carries on or intends to carry on business, to be recorded by him. Until such rules are so recorded, the union will not be entitled, in the country in which such rules have not been recorded, to any of the privileges arising from registration, and, until such amendments of rules be recorded, the same cannot take effect in that country. A trade union having its registered office in one country, but which has recorded its rules with another in accordance with this requirement, is subject to the jurisdiction of the Courts in the country in which its rules have been recorded.

By the Schedule to the Act of 1871 it is provided that they must contain the following particulars:

1. The name of the trade union and its place of meeting for the transaction of its business.

2. The whole of the objects, for which the trade union is to be established; the purposes for which the funds thereof shall be applicable; the conditions under which any member may become entitled to any benefit assured thereby; and the fines and forfeitures which it resolves to impose on any

of its members. The objects must be objects which it is competent for a trade union to pursue,[1] but the Court will not prevent a trade union carrying out one of its lawful objects, provided for in its rules, merely on the ground that the rules do not contain the machinery necessary for carrying out such object.[2] It will not interfere in mere matters of internal administration.

3. The manner of making, altering, amending and rescinding rules. Where the rules contain a provision for alteration, effectual when carried by a stipulated majority, every member, even an insane one, is bound by alterations thus duly carried.[3]

4. A provision for the appointment and removal of a general committee of management, of a trustee or trustees, treasurer, and other officers.

5. A provision for the investment of the funds, and for an annual or periodical audit of accounts.

6. A provision for the inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union. The members of the trade union are entitled to employ an accountant to inspect the books and accounts for them, provided that the accountant gives an undertaking that the information obtained will only be used for informing his clients of the result of the inspection.[4]

7. A provision for dissolution. In the absence

[1] Osborne *v.* Amalgamated Society of Railway Servants [1910], A.C. 87. [2] Burke *v.* Amalgamated Society of Dyers [1906], 2 K.B. 583. [3] *Ibid.* [4] Norrey *v.* Keep [1909], 1 Ch. 561.

of rules dealing with the distribution of funds on dissolution, where the members of a trade union, about to be dissolved, are subscribing in different proportions and receiving proportionate benefits, then the money is divisible among them in proportion to the amounts respectively contributed.[1]

In case of doubt as to the meaning of the rules, application may be made to the Court to determine their construction.[2]

A copy of their rules must be delivered by a trade union to every person on demand, on payment of a sum not exceeding one shilling, and it is a misdemeanour for any person, with intent to mislead or defraud, to give to any person who intends to become or is a member of a trade union a copy of the rules, incorrect in whole or in part, whether by addition, alteration or omission, or to give to any such person a copy of the rules of an unregistered trade union on the pretence that such trade union is in fact registered.

Upon registering the trade union, the Registrar must issue a certificate of registration, which is conclusive evidence that the requirements to obtain registration have been complied with, unless the certificate be proved to have been withdrawn or cancelled. But the certificate of the Registrar is not conclusive evidence as to whether the society is or is not lawful,[3] nor as to the validity of the proceedings taken by a trade union for the

[1] In *re* Printers and Transferers' Amalgamated Trades Protection Society [1899] 2 Ch. 187. [2] In *re* Durham Miners' Association, Watson *v.* Cann (1900) 17 T.L.R. 39. [3] Gozney *v.* Bristol Trade and Provident Society [1909], 1 K.B, 901.

passing of such rules and regulations.[1] In the case of a trade union which has been in operation for more than a year before the date of the application for registration, there is a special provision whereby a general statement of the receipts, funds, effects and expenditure of the trade union must be delivered to the Registrar. Such a statement must be in a similar form to the annual general statement of a trade union.

A trade union may change its name, with the consent of not less than two-thirds of all its members, provided that the approval in writing (in a prescribed form) of the chief Registrar (and in the case of trade unions registered and doing business exclusively in Scotland or Ireland, of the assistant registrar for Scotland or Ireland respectively) be first obtained. Notice in writing of every such change in name, signed by seven members, and countersigned by the secretary of the trade union, accompanied by a statutory declaration by him that the foregoing requirements in respect of change of name have been complied with, must be sent to the central office of the chief Registrar and registered there, and until such change of name is so registered the same does not take effect. Such change of name does not, by itself, affect the rights or obligations of a registered trade union or of its members.

By the Trade Union (Amalgamation) Act, 1917, any two or more trade unions may, where 50 per cent. of the members entitled to vote are

[1] Osborne *v.* Amalgamated Society of Railway Servants (No. 1) [1909], 1 Ch.D. 163; affirmed (1910) A.C. 87.

recorded and those in favour exceed those against by 20 per cent., amalgamate as one trade union, with or without any dissolution or division of the funds of such trade unions.[1] It is doubtful how far, in spite of this general power, the rules must specifically authorize the amalgamation.[2] Notice in writing of every such amalgamation, signed by seven members, and countersigned by the secretary of every amalgamating union, accompanied by a statutory declaration, made by every such secretary to the effect that the foregoing requirements in respect of amalgamation have been complied with, must be sent to the central office of the chief Registrar and be registered there; and, until such amalgamation is so registered, the amalgamation does not take effect. Such an amalgamation does not prejudice the right of a creditor of an amalgamating trade union.

At the request of a trade union, a certificate of registration may be withdrawn by the chief Registrar (in the case of trade unions registered and carrying on business exclusively in Scotland or Ireland, by the assistant registrar of Scotland or Ireland respectively).

Every registered trade union must transmit to the Registrar annually, before June 1st, a general statement of its receipts, funds, effects, and expenditure, showing the assets and liabilities at that date and the receipts and expenditure with the respective items thereof during the year preceding.

[1] 7 and 8, Geo. 5, ch. 24. [2] Per Fry, J., in Wolfe *v.* Mathews (1882), 30 W.R. 838, p. 839.

The statement must be prepared and made out up to such date, in such form, and with such particulars as the Registrar may require. Every member of and depositor in any such trade union is entitled, on application to the treasurer or secretary of the trade union, to receive a copy of the general statement, free of charge. Together with the general statement, a copy of all alterations of rules, new rules, and changes of officers made by the trade union during the year, and a copy of the rules of the trade union, must be sent to the Registrar. Every such trade union and every officer thereof, failing to comply with or acting in contravention of these requirements, are both liable to a penalty not exceeding £5 for each offence. Every person who wilfully makes or orders to be made any false entry in or omission from a general statement, or in or from the return of such copies or alterations of rules, is liable to a penalty not exceeding £50 for each offence.

Generally, a trade union which fails to give any notice or send any document, which it is required to give or send to the Registrar, or every person who, being bound by the rules thereof to give or send the same, likewise so fails, is liable to a penalty or not less than £1 and not more than £5, and to an additional penalty of the like amount for every week during which such failure continues. If there be no such person, then every member of the committee of management of the union, unless proved either to have been ignorant of the duty to give such notice or send such document, or to have attempted to prevent such failure to

give or send the same, is liable to the like penalty. Such penalty is recoverable at the suit of the chief or any assistant registrar, or of any person aggrieved.

The chief Registrar must lay annual reports before Parliament with respect to the matters transacted by the registrars in pursuance of the Trade Union Acts.

The rules of every registered trade union must provide for the manner of dissolving the same. Notice of dissolution, under the hand of the secretary and seven members, must be sent within fourteen days thereafter to the central office (in the case of registered trade unions doing business exclusively in Scotland or Ireland respectively), and such notice of dissolution must be registered by the Registrar. (1876) 39 and 40 Vict. c. 22, s. 14; Reg. (31).

All property belonging to a registered trade union must be vested in the trustees (no member under twenty-one may be a trustee, treasurer, or a member of the committee of management) for the time being. In the case of a branch of a trade union the property may be vested in the trustees of the branch, or, if the rules of the trade union so provide, in the trustees of the trade union.[1] As to the rights of trustees to sue and be sued, etc., *vide infra*, pp. 174 *et seq.* The words of the Act are "all real and personal estate whatsoever," which mean in effect all property generally,[2] and "the property, so held, is the property of the

[1] See Cope *v.* Crossingham [1909], 2 ch. 148, at p. 158. [2] Curle *v.* Lester [1893], 9 T.L.R. 480; Linaker *v.* Pilcher [1901], 84 L.T. 421.

union; the union is the beneficial owner."[1] It is not necessary that the trustees should be members of the union.[2]

Upon the death or removal of trustees, the property of the trade union vests in the succeeding trustees precisely as in their predecessors. No conveyance or assignment is necessary, except in the cases of stocks and securities in the public funds of Great Britain and Ireland, in which case such stocks and securities must be transferred into the names of the new trustees.

§ 4.—OFFICERS.

A trustee of a registered trade union is liable for moneys actually received by him on account of the trade union, but is not otherwise liable to make good any deficiency which may arise in the funds of the trade union. The treasurer (or other appointed officer) of a registered trade union must render, either to the trustees or to the members at a meeting of the trade union, a just and true account of all moneys received and paid by him since he last rendered an account, a like account of the balance then remaining in his hands, and of all bonds and securities of the trade union. Such account must be rendered by him at such times as the rules require, or upon his being expressly required to do so. The trustees must appoint some fit and proper person or persons to audit such

[1] Per Lord Lindley in Taff Vale Railway Company *v.* Amalgamated Society of Railway Servants [1901], A.C. 416, at p. 444.
[2] Per Lord Davey, in Yorkshire Miners' Association [1905], A.C. 256, at p. 271.

accounts. The treasurer, if so required, must, after the audit, forthwith hand over to the trustees the balance displayed by the audit, and must also, if required, hand over to the trustees all securities and effects, books, papers, and property of the trade union in his possession. If he fails to do so, the trustees may sue him in any competent Court for the balance of the account displayed by the audit and for all moneys since received by him on account of the trade union, and for the securities and effects, books, papers, and property of the trade union. In such an action the treasurer may set off such sums as he has disbursed on account of the trade union, and the trustees in such action are entitled to their full costs as between solicitor and client.

Moreover, if any officer, member or other person, being, or representing himself to be, a member of a registered trade union or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition, obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, such officer, member, or other person may be ordered by the Court to deliver up all such money, securities, books, papers, or other effects to the trade union, or to repay the amount of money applied improperly, and to pay, if the Court think fit, a further

sum of money not exceeding £20, together with costs not exceeding 20s. In default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs, the Court may order the person convicted of such default to be imprisoned, with or without hard labour, for any time not exceeding three months. The debt is not a civil debt and the power of commitment, therefore, can be enforced.[1] The trade union, or in Scotland, His Majesty's Advocate, may also proceed criminally by indictment against the party; but no person may be proceeded against by indictment, unless a conviction has been previously obtained for the same offence. Summary remedies for misapplications of the trade union's property are provided, but there is nothing to oust the jurisdiction of the superior Courts.[2]

Where any such person has suffered imprisonment for such offence, he cannot afterwards be sued civilly. If the union "elect to have recourse to the remedy provided by section 12 of the 1871 Act, the claim of the society against the defendant is satisfied by his conviction by the Court."[3] Conversely, if he has been sued civilly, in the absence of fraud, he cannot be prosecuted criminally. In Madden v. Rhodes,[4] where an officer of a trade union against whom fraud was not alleged withheld the money of the trade union,

[1] R. *v.* Truscott [1900], 81 L.T. 188. [2] Per Lord Lindley, Taff Vale Railway Company *v.* Amalgamated Society of Railway Servants [1901], A.C. 426, p. 444. [3] Per Field, J., Knight *v.* Whitmore (1885) 53 L.T. 233, p. 234. [4] [1906] 1 K.B. 534. See also Agnew *v.* Addison (1893) 20 R. (J.C.) 19.

it was considered that the language of the section sanctioning prosecution was substantially the same as that of section 24 of the Friendly Societies Act, 1855,[1] and as, under the latter section, a civil remedy is given against the treasurer (as is also the case under section 9 of the Trade Union Act, 1871),[2] it was held by the Divisional Court on analogy that the penal remedy should only be applied when the conduct complained of partakes of fraud in some way. The Falsification of Accounts Act (1875)[3] also affords protection, both to registered and unregistered trade unions; it enacts that any person (employed by a trade union) who, with intent to defraud, mutilates or destroys a book, security or account of the union or makes a false entry in an account, is liable to penal servitude for seven years or imprisonment for two years. The Larceny Acts (1868), § 31 and 32 Vict. c. 116, enables the beneficial co-owners of property to be prosecuted for stealing, or embezzling their common property.

An unregistered trade union may also prosecute for embezzlement of its property.[4]

A registered trade union or branch thereof may purchase or take upon lease (in the names of its trustees) any land not exceeding one acre. It may also sell, exchange, mortgage or let the same. No purchaser, assignee, mortgagee, or tenant is bound to inquire whether the trustees have authority to perform any of these transactions, and the receipt

[1] Per Lord Alverstone, C.J., *ibid.*, p. 537. [2] Barret *v.* Markham (1872), 7 L.R.C.P. 405. [3] 38 and 39 Vict.c. 24. [4] R. *v.* Stainer (1870), L.R. 1, C.C.R. 230; R. *v.* Tankard [1894] 1 Q.B. 548.

of the trustees is a sufficient discharge for the money arising therefrom.

A registered trade union has power to acquire land by paying for it, but cannot take land by devise. In *re* Amos, Carrier *v.* Price, North J. held that the power to purchase or take on lease land, given by section 7 of the 1871 Act to a registered trade union, means a power to acquire property by purchase, or by taking a lease of it. The word "purchase," in that section, does not have the meaning of acquiring otherwise than by descent or escheat.[1] It would seem that an unregistered trade union apparently is capable of taking land without any such restriction.[2]

A registered trade union is exempt from income under schedules A, C and D where such moneys are applicable and are applied solely for the purpose of provident benefits. Provident benefits include any payment to a member of the union during sickness, while he is out of work, or when he is aged, or any payment for tools or funeral expenses. The exemption only extends to cases where the amount assured by the rules of the union does not exceed £300, or the amount of an annuity granted to any member or his nominee does not exceed £52 per annum.[3]

By the Friendly Societies Act, 1896,[4] a registered trade union or its branch may contribute to the funds of, and take part (by delegates or otherwise) in, the government of a society

[1] Per North J., in *re* Amos, Carrier *v.* Price [1891], 3 Ch. 159, p. 165. [2] *Re* Amos, Carrier *v.* Price [1891], 3 Ch. 159. [3] Income Tax Act, 1918, 8 and 9 Geo. V, s. 30 (1) c. 90. [4] 59 and 60 Vict. c. 25.

which relieves sickness by providing attendance and medicine; though by so doing, it does not become a friendly society. The trade union, if desirous of withdrawing from such society, must give the society three months' notice and pay all contributions due at the end of that period, to the medical society.[1] The contributing trade unions or branches do not become members or branches of the society to which they contribute. A dispute between a trade union and such a society cannot be referred to arbitration under the rules of the latter.[2]

A member of a registered trade union, not being under the age of sixteen years, may, by writing under his hand, delivered at, or sent to, the office of the trade union, nominate any person not being an officer or servant of the trade union (except the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator), to whom any moneys (not exceeding £100) payable on the death of such member shall be paid at his decease.[3] Such nomination may be partly printed, and, if made in a book kept at the office, is deemed to be delivered at such office.[4]

If a member of a registered trade union, who is entitled from the funds thereof to a sum not exceeding £100, dies intestate, without leaving any subsisting nomination at the time of his death, such sum is nevertheless payable, without letters of administration. The person to whom this sum is to be paid, is the person who appears to a

[1] 59 and 60 Vict., c. 25, s. 22 (2), (3). [2] Snell *v.* Vine (1890), F. S. Cas. 313. [3] (1876) 39 and 40 Vict., c. 22, s. 10; (1883) 46 and 47 Vict., c. 47, s. 3. [4] (1883) 46 and 47 Vict., c. 47, s. 4.

majority of the trustees, upon evidence deemed satisfactory by them, to be entitled by law to receive it.[1]

If a member of a registered trade union, not being under the age of sixteen years, is illegitimate and has died intestate, without leaving any such nomination, the trustees may pay the sum which such member may die possessed of to the person or persons who, in the opinion of the majority of such trustees, would have been entitled thereto, if such member had been legitimate. If there be no such persons, the deposit must be dealt with as the Treasury may direct.

All payments made by trustees under these powers are valid against persons claiming as next-of-kin or representative of the deceased. But such next-of-kin or representative may recover money paid by the trustees from the recipients.

In Crocker *v.* Knight,[2] it was held by the Court of Appeal that section 4 of the 1871 Act prevents the Court from entertaining legal proceedings to enforce the foregoing provisions as to nomination. The plaintiff, the widow of a member of a registered trade union, had been nominated by her husband to receive his funeral money from the society.

[1] (1883) 46 and 47 Vict., c. 47, s. 7. [2] [1892] 1 Q.B. 702.

LECTURE IV.—CONTRACT.

§ 1.—Procedural.

A trade union is a voluntary association whose objects are frequently unlawful at common law as being in restraint of trade. This illegality is, in part, removed by sections 2 and 3 of the Trade Union Act, 1871, and, therefore, in considering the contractual position of trade unions, we may take our start from a consideration of voluntary associations generally, and ignore, for the time being, the peculiar elements of common law unlawfulness in a trade union.

We know how vacillating and ambiguous has been the recognition of unincorporated associations by the law. They are recognized by taxing statutes,[1] but the common law hesitates to accept them. There must be a "person" or "body politique or corporate" for a common law prescription.[2] Custom "serveth for them who cannot prescribe in their own name,"[3] but the body claiming may be too vague to be thus helped.[4]

The case of *In re* Amos, Carrier *v.* Price,[5] in which land was devised to a trade union, shows that, notwithstanding the power to purchase land given to a registered trade union under the Trade Union Act, 1871, a trade union still suffers from

[1] *E.g.*, 10 Edw. 7 c. 8, s. 6, etc. [2] Co. Litt. 113*b*. [3] Greenwood's Case, 6 Rep. 5, 9*b*. [4] Selby *v.* Robinson (1788), 2 Term. Rep. 758. [5] [1891] 3 Ch. 159.

incapacity of a non-charitable unincorporated association of an uncertain number of persons to acquire land by devise, although, where the devise is not of land, and is not a charity, it may be good, and treated as a bequest to the several members of the association, who can spend the money as they please.[1]

It will be found that the whole legal position of a voluntary association centres round the fact that it is possessed of some property or patrimonial interests. In itself it lacks that inherent status which attaches to an individual or a corporation.

So far as a registered trade union is concerned, the 1871 Act, by section eight, provides that all real and personal estate whatsoever belonging to a trade union, registered under the Act, shall be vested in trustees for the time being for the use and benefit of the members thereof, and the real and personal estate of any branch shall be similarly vested in the trustees of the branch; the Act of 1876 provides, by way of amendment, in section 3, that the rules of a trade union may provide that the property of a branch be vested in the trustees of the union. Section 9 of the 1871 Act proceeds to provide that such trustees or any other officer authorized to do so may sue and be sued in all cases touching the real and personal property of the union.

I have been unable to find any case, before 1871, in which a trade union has been party to proceedings in contract, and, even since that time, the actions which have been brought have nearly all

[1] *In re* Clarke [1901], 2 Ch. 110.

been by members against the society or vice versa, raising special peculiar considerations. An exception is the case of Curle *v.* Lester,[1] in which an official sued a trade union for salary, and Sanson *v.* United Vehicle Workers' Union.[2] In Kelly *v.* National Society of Operative Printers Assistants,[3] it was held that general damages cannot be obtained by a member of the society under a contract with the society.

It would appear that the special statutory right of trustees to sue and be sued does not extend to an unregistered trade union, and, in such a case, the device of the representative action must be employed. This difficulty does not appear to arise in Scotland, where trade unions may sue and be sued in the general name of the union, possibly with the addition of the names of three members,[4] but it is doubtful whether the three members are really necessary.[5]

Two members of the House of Lords, Lord Atkinson and Lord Loreburn, have suggested that, when a trade union is lawful at common law, the union should sue and be sued, even when it has been registered, in a representative action and not in the name of the union or its trustees, as in that case the union does not depend for its status on the 1871 Act at all; but this line of reasoning does not appear in any of the earlier cases. Russell *v.* Amalgamated Society of Carpenters and Joiners.[6] This view was, apparently, accepted in Thomas *v.*

[1] (1893) 9 T.L.R. 480. [2] (1920), 36 T.L.R. 666. [3] 84 L.J., K.B. 557. [4] Mackay, *Court of Sessions Practice.* [5] Agnew *v.* Addison [1893], 20 R. 19; Smith *v.* Lothian (1862), 4 Irv., 170. [6] [1912] A.C. 421, pp. 428, 430.

Portsmouth "A" branch of the Ship Constructive Association.[1]

The old Chancery procedure of the representative action is now of general application (See Order 16, rule 9 R. S. C.; in Ireland Order 3 rule 4). It was held in Temperton *v.* Russell[2] that the limiting words in the Order "having the same interest in one cause or matter" extended to persons having contractual or proprietary interests, but not to cases of action for tort. A right to benefit was subsequently held to be such a proprietary interest.[3] The limitation as to the use of the representative action assumed in Temperton's case was disapproved in the House of Lords in Duke of Bedford *v.* Ellis,[4] but it has since been held that, at any rate, in actions of tort, a registered trade union may be sued in its registered name,[5] though the observations of several learned lords in the Taff Vale case, more particularly Lord Brampton, leave it doubtful whether such a procedure is open in case of contract.

Wherever the representative action is employed, the persons selected to sue or be sued must be such as may be fairly taken to represent the union, if possible, persons who are managers of the union, having control over it or its funds, such as the executive committee and the trustees.[6] The President and Secretary of a trade union may be sufficient where there are no trustees, in actions of contract.[7]

[1] 28 T.L.R. 372. [2] [1893] 1 Q.B. 435. [3] Wood *v.* M'Carthy. [1893], 1 Q.B. 775. [4] [1901] A.C. 1. [5] Taff Vale Railway *v.* Amalgamated Society of Railway Servants [1901], A.C. 426. [6] See Lord Macnaghten in Taff Vale case, p. 439. [7] Wood *v.* M'Carthy, *ibid.*

In Charnock *v.* Court,[1] persons were added by the Court to remedy a deficiency in the representation. Generally the Court has power to join claims against defendants when it is of opinion that the right to relief arises out of the same transactions[2] and this power was exercised in a case where it was sought to restrain several members of a trade union from watching and besetting,[3] though doubtless it is equally applicable to a case of contract.[4]

So far then as procedure is concerned, it would appear that there are three ways in which a trade union may be made a party to legal process. The first, that of the representative action, is of general application; the second method, that of suing under section 9 of the 1871 Act, is confined to registered trade unions and, according to two of the learned Lords in Russell's case, the method is not appropriate to a trade union lawful at common law, which, therefore, does not depend upon or have recourse to the 1871 Act at all; the third method is for a registered union to sue and be sued in its registered name. This method is clearly open in cases of Tort, but according to Farwell J., in the Taff Vale case,[5] sections 8 and 9 of the Act of 1871 expressly provide for actions in respect of property being brought by and against the trustees, and this express intention impliedly excludes such trustees from being sued in tort.

There have been several actions for injunction, however, which have been brought against trade

[1] [1899] 2 Ch. 696. [2] Order 6, rule 1. [3] Walters *v.* Green [1899], 2 Ch. 696. [4] See also Scottish Co-operative Wholesale Societies Ltd. *v.* Glasgow Fleshers Trade Defence Association (1898), 35 S.L.R. 645. [5] [1901] A.C. 426, p. 431.

unions in their registered name and some of these have gone on to claim damages in contract, such as McKernan *v.* The United Operative Masons' Association,[1] Shanks *v.* the same,[2] Aitken *v.* The Associated Carpenters and Joiners of Scotland,[3] a case curiously enough of an unregistered union where the procedural point was never taken, Howden *v.* The Yorkshire Miners' Association,[4] Steele *v.* The South Wales Miners' Federation,[5] Osborne *v.* The Amalgamated Society of Railway Servants (two cases),[6] Russell *v.* The Amalgamated Society of Carpenters,[7] Wilson *v.* The Scottish Typographical Association,[8] Love *v.* The Amalgamated Society of Lithographic Printers,[9] Wolstenholme *v.* The Amalgamated Musicians' Union,[10] and Burn *v.* The Amalgamated Labourers' Union.[11]

The case of Sanson *v.* The United Vehicle Workers' Union,[12] a case founded on breach of contract, seems to establish the fact that even in such cases the union may be sued in its registered name in simple contract, but the procedural objection was apparently not taken, and there remain dicta in the Taff Vale case which would seem to limit this form of action to cases of tort or delict justifying injunction.

§ 2.—Domestic Disputes.

As has already been said, the great bulk of contractual actions have been between trade unions

[1] (1874) 1 Rettie 453. [2] *Ibid.*, 823. [3] (1885) 12 Rettie 1206. [4] [1905] A.C. 256. [5] [1907] 1 K.B. 361. [6] [1910] A.C. 87 and [1911] 1 Ch. 540. [7] [1912] A.C. 421. [8] [1912] S.C. 534. [9] [1912] S.C. 10, 78. [10] [1920] 2 Ch. 388. [11] [1920] 2 Ch. 364. [12] (1920), 36 T.L.R. 666.

and their members, and these cases have immediately raised the problem of the jurisdiction of the court under section 4 of the 1871 Act.

This section, which has never been repealed or amended, provides that: Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for breach of any of the following agreements, namely:

(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed.

(2) Any agreement for the payment of any person of any subscription or penalty to a trade union.

(3) Any agreement for the application of the funds of a trade union—

(*a*) To provide benefits to members; or

(*b*) To furnish contributions to any employer or workman not a member of such a trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

(*c*) To discharge any fine imposed upon any person by sentence of a court of justice; or

(4) Any agreement made between one trade union and another; or

(5) Any bond to secure the performance of any of the above mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above mentioned agreements unlawful.

It has been suggested in the first lecture that this limitation could have no application to the case where the trade union was lawful at common law, as, in such a case, the society could be sued without recourse to the 1871 Act at all, but this subtlety does not make its appearance before 1889.

The problem that first arises tends to centre round the words "directly enforce." It will be remembered that the limitation of jurisdiction under section 4 is confined to cases of proceedings instituted for the purpose of "directly enforcing or recovering damages," but what constitutes a direct enforcement?

The authorities, which are many, are not easy to reconcile in all respects, and it is difficult to arrive at any certain principle. Indeed, so subtle are the gradations of opinion, that it really becomes necessary to consider all the cases if one is to hope to arrive at any definite result.

The earliest cases appear to have been Scottish ones, and, from the outset, the Courts there appear to have taken a wider view of the limitation than have, at any rate, the later English ones.

The problem of the ambit of the limitation does not directly appear in the earliest cases, but soon forces itself upon judicial notice.

In McKernan *v.* United Masons' Association,[1] the plaintiff started an action against the defendant association and the executive committee in order to

[1] (1874) 1 R. 453.

recover benefit money which he claimed was due to him under the rules of the Association. It was held by the Second Division of the Court of Session that in terms of section 4 of the 1871 Act, the claim could not be enforced in a Court of Law. The Lord Justice Clerk observed, "The plea is that the purposes of this association, being in restraint of trade, agreements made in respect of them are void or voidable. It was put from the bar as *pactum illicitum*. It is perfectly clear from the terms of the Trade Union Act, 1871, section 3, that the intention and object of the Act was to declare the very reverse of that proposition, and that the purposes of a trade union shall not be lawful so as to render void or voidable any agreement or trust by reason merely that they are in restraint of trade. Granting that the agreements or trusts are neither void nor voidable, are they to be enforced in a civil Court?"[1]

Rigby *v.* Connol,[2] is the first English case bearing on this section. The previous Scottish authorities were not cited, indeed, Sir George Jessel said that the matter appeared to him to be free from authority. In that case the rules of a registered trade union provided, *inter alia*, for fines in the event of a member binding his son in a shop in which non-union men were employed. The plaintiff refused to pay a such fine and consequently was expelled. He brought an action against the committee and trustees of the union, claiming a declaration that he was entitled to participate in the enjoyment of the property and effects of the

[1] (1874) 1 R. 453. [2] (1880) 14 Ch.D. 482.

trade union, and in its rights, privileges, and benefits, and the pretended expulsion was invalid, and an injunction restraining the defendants from excluding him from such participation and damages. It was held that the action was brought for the purpose of directly enforcing an agreement between members of a trade union "to provide benefits to members or discharge a fine" within the meaning of Section 4 (3) (*a*) and (*c*).

In the case of Duke *v.* Littleboy,[1] the words "directly enforce" were given an even wider scope; the executive council of a registered trade union, through its officers, claimed an injunction against officers of a branch to restrain them from dividing funds belonging to the central society among members of the branch, and they claimed payment of the balance over after the current expenses of the branch had been satisfied. In so far as section 4 (3) (*a*) was concerned the only authority adduced in the argument or referred to in the judgment was Rigby *v.* Connol. It is to be noted that a Scottish case M'Laren *v.* Miller which was identical as to facts was decided otherwise, about the same time. Denman J. followed Rigby *v.* Connol and adopted the reasoning of Jessel, M.R.

As has been said, in M'Laren *v.* Miller, the words "directly enforce" are more narrowly defined than in Duke *v.* Littleboy, producing the opposite result. There it was held by the Second Division of the Court of Session (Lords Ormidale, Gifford and Young) that an

[1] (1880) 49 L.J. (Ch.) 802.

application, at the instance of the general trustees of a registered trade union, for interdict against the trustees of a branch to restrain them from applying funds in their hands for purposes alleged to be other than those specified in the rules, does not fall within the category of legal proceedings instituted with the object of "directly enforcing or recovering damages for the breach of" any of the agreements enumerated under the Trade Union Act, 1871, Section 4, and is not therefore a legal proceeding which the Court has no power to entertain. The Court, having found that the defendants proposed illegally to interfere with and appropriate the funds in question, granted an injunction restraining them from applying any part of the said funds until the rights of the parties were ascertained. In this case the plaintiffs sought an injunction against the defendants uplifting certain sums of money deposited in the bank in their names; paying away any portion of these funds except in accordance with the rules, and carrying out a resolution alleged to have been come to to uplift these funds and pay them away. They contended that a division of the funds in the manner proposed by the defendants was *ultra vires* and illegal. The defendants set up section 4 of the 1871 Act. They further contended that the action was incompetent on the ground that it was virtually an action of declaration affecting the society's organization and not an action for payment. The basis on which all the judges founded their judgments was that the suit was not a legal proceeding for directly enforcing any agreement or claim for

damages, but was a proceeding by interdict to preserve the *status quo* of the parties.

This decision is the first in which the distinction has been taken that, in interpreting the meaning of the words "directly enforced" in section 4 there is a difference in granting an injunction as compared with granting a declaration. In this case McKernan *v.* United Operative Masons' Association was referred to, but no reference is to be found in the report to Shanks *v.* The Same, nor to Rigby *v.* Connol. "The action is simply one for interdict," it was said, "and that appears to contain the essence of this case. Whether in point of law the conclusion to which the sheriff has come, that the fourth section of the statute quoted does not apply, is a right one can only be ascertained by a consideration of the section itself. To my mind it is obvious that the expressions in the section have no reference to actions of interdict, which are intended merely to preserve the *status quo*."

Lord Young, referring to McKernan's case, said,[1] "I think it is right to say that I could only concur in some of the observations of the judges in that case if at common law, and before the statute was passed, the action would not have been maintainable in this Court. . . . All the 1871 Act says is, that having regard to the nature of the agreement sought to be enforced, if it would not have been enforceable at common law, the statute will give no assistance."

The narrower interpretation soon spread to England. In Wolfe *v.* Matthews,[2] members of

[1] *Ibid.*, p. 873. [2] (1882) 21 Ch.D. 194.

an unregistered society sought an injunction to restrain other members from applying any part of the funds of the society in carrying out an amalgamation of the society with another society. Duke *v.* Littleboy was not cited, the only case referred to (at any rate in the report) being Rigby *v.* Connol. In setting aside the preliminary objection to want of jurisdiction in the Court, Fry J. said, "It is plain that this is not an action to recover damages for the breach of any agreement neither is it, in my opinion, an action directly to enforce an agreement, which proceedings are alone mentioned in the fourth section. An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of moneys to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement. For these reasons I am of opinion that the judgment of Jessel M.R., in Rigby *v.* Connol, does not apply to this case, and that the preliminary objection must be overruled, though it will remain to be seen whether the terms of the Act will eventually permit any relief to be given by the Court to the plaintiffs." Fry J. arrived at the same conclusion as the Second Division of the Court of Session in McLaren *v.* Miller though that case does not appear to have been cited. But the ground of Fry J.'s decision seems to have been that the grant of an injunction is either indirect enforcement or no enforcement of an agreement, while the Scottish Court regarded the grant of an

interdict merely as preservative of the *status quo*.

Aitken *v.* Associated Carpenters and Joiners of Scotland,[1] in which a member of a trade union brought an action against the union asking for reduction of certain resolutions imposing a fine upon him and depriving him of membership; for declarator that his expulsion was illegal, and that he was entitled to damages for loss of benefits attached to membership, carries the matter no further as there was no claim for injunction. The First Division (Lord President Inglis, Lords Mure and Shand) unanimously decided: That the society being merely a voluntary association no action lay at the instance of a member to enforce his right to membership unless he could show patrimonial loss, and that the only loss alleged was deprivation of a right under a contract not enforceable by law: and that an action against a trade union directed to enforcing or recovering damages for breach of an agreement to provide benefits could not be entertained by the Court.

In 1890 a new ground for jurisdiction, namely that a trade union might be lawful at common law, and that therefore the limitations of section 4 of the 1871 Act did not apply at all, was first raised in the case of Swaine *v.* Wilson.[2] The importance of this argument deserves, and will receive, separate treatment.

In Yorkshire Miners' Association *v.* Howden[3] the action was brought by the plaintiff, a member of a registered trade union, which, but for the 1871

[1] (1885) 2 R. 1206. [2] (1889) 24 Q.B.D. 252. [3] [1905] A.C. 256.

Act, was admitted to be illegal, against that union and its officers for the purpose of restraining them by injunction from misapplying the funds of the association contrary to its rules and the provisions contained therein. It was held unanimously in the Court of Appeal and affirmed by the House of Lords (Lords Davey and James dissenting) that the action was not instituted with the object of "directly enforcing" an agreement for the application of funds to provide benefits to members within the meaning of the Trade Union Act 1871, section 4, the object being not to enforce application but to prevent misapplication of the funds, and that the action was consequently maintainable; and that the payment of strike pay made in pursuance of a resolution of the executive council of the defendant association was in contravention of the rules, and that the resolution purporting to authorize such payment was *ultra vires* and illegal.

In the House of Lords,[1] the Lord Chancellor, the Earl of Halsbury, in his judgment,[2] adopted the reasoning of Fry J. in Wolfe *v.* Matthews in the following words: "I cannot escape from this reasoning, nor do I see any inconsistency between that decision and the case of Rigby *v.* Connol before Sir George Jessel, and a long line of judicial decisions has recognized the distinction which the learned Judge himself pointed out, and between the case before him and the decision given by Sir George Jessel. I am bound, however, to say that, if the decision ever came up for review, I think it

[1] [1905] A.C. 256. [2] *Ibid.*, p. 261.

would have to be considered whether it does not strike the word 'directly' out of the statute."

Lord Macnaghten said:[1] "I cannot think that the legislature intended to strike at proceedings for directly enforcing certain agreements, leaving untouched and unaffected all proceedings (other than actions for damages) designed to enforce those particular agreements indirectly. To forbid direct action in language that suggests that the object of the action so forbidden may be attained by a sidewind seems to me somewhat of a novelty in legislation. I venture to think that the word 'directly' is only given to point to the antithesis between proceedings to enforce agreements directly and proceedings to recover damages for breach of contract, which tend, though indirectly, to give force and strength to the agreement for breach of which an action may be brought." Speaking of section 4 generally, Lord Macnaghten said:[2] "What was the object of the present litigation? Was it to enforce an agreement for the application of the funds of the union to provide benefits to members? I should say, certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union, which was challenged by the plaintiff, was not authorized by the rules. The decision might take the form of a declaration or the form of an injunction, or both combined. No administration or application of the funds was sought or desired. The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer

[1] [1905] A.C., p. 264. [2] *Ibid.*, p. 265.

those funds, or to apply them for the purpose of providing benefits to members. I am aware that in expressing this view I am dissenting from the opinion of Sir George Jessel in the case of Rigby *v.* Connol. . . . The proceedings which the plaintiff has instituted do not, I think, involve the administration of the funds of the association, collected for benevolent purposes, or the application of those funds to provide benefits to members. Nor was the litigation, as it seems to me, instituted with that object. It was simply an application to the Court to determine the true construction of certain rules which had been, as the plaintiff contended, misconstrued by the executive of the association."

Lord Lindley in his judgment said,[1] "The words of section 4 suggest the following observations: The Section extends not only to Courts of Law but also to Courts of Equity. The Section does not prohibit any Court from exercising in any case jurisdiction which it could have exercised before the Act passed; the section simply prevents any Court from extending its jurisdiction and interfering in cases in which the Act would authorize interference if it were not for the direct prohibition contained in the section. No legal proceeding, which might be taken, if the section did not prohibit it, is prohibited, except a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of the specified agreements. The word 'directly' is important and limits the application of the section.

[1] [1905] A.C., pp. 281.

Legal proceedings for other purposes than those specified are not prohibited; although they may indirectly affect agreements on which no action can be brought."

Lord Lindley remarked that the only agreement to be considered was the third one in section 4, viz., an agreement for the application of the funds of a trade union (*a*) to provide benefits to members or (*b*) to furnish contributions, or (*c*) to discharge any fine. "I am," he continued, "quite unable to see that these words include such an action as that which has been brought in this case.[1] The object of this action is not directly to enforce any agreement for the application of the funds of the trade union in any of the ways specified under the third head. The object of the action is not to apply the funds, but to preserve them for future application, and to my mind this action is no more struck at by section 4 than is an action brought by the trustees for the recovery of the funds of the trade union from some person wrongly in possession of them."[2] "All trusts," he said, "except those created by statute, may be said to be created by a contract between the parties to the instrument creating the trusts. But these trusts can be forced in equity by any person entitled to the benefit of them. A suit by a *cestui que trust* against his trustee is not what is usually understood as a proceeding to enforce an agreement; if it were, the suit could only be maintained by some person who was a party to the agreement creating the trust. Considering the object of the action, it

[1] [1905] A.C., p. 282. [2] *Ibid.*, p. 281.

appears to me competent for any member who has a beneficial interest in the funds of the union to sue to prevent their application to purposes not warranted by the rules as they stand. It is true the rules may be altered, but it does not follow that the Court ought not to enforce the trust created by them as they stand."[1]

Lords Davey and James dissented on the ground that in their opinion this action was brought for the purpose of "directly" enforcing an agreement for the application of the funds of a trade union to provide benefits to members, and that there was no distinction in principle between an injunction to restrain the exclusion of the plaintiff from a right to participation in the property, and one to restrain the removal or diversion of the property in which he claims to participate. Referring to the case of M'Laren *v.* Miller, Lord Davey remarked,[2] "The interdict granted there was only to keep things in *statu quo* until the rights of the parties should be ascertained. It was, however, an action, by trustees under section 9, to which, I think, different considerations may apply. If and so far as it is a decision against the opinion I have already expressed on the construction of the Act, I think it was wrongly decided."

In Steele *v.* South Wales Miners' Federation,[3] Mr. Justice Phillimore, moreover, was of opinion that an injunction restraining the levy of funds for Parliamentary representation would not be a direct enforcement of an agreement providing benefits

[1] [1905] A.C., pp. 230. [2] [1905] A.C., p. 274. [3] [1907] 1 K.B. 361.

to members. He remarked,[1] "No doubt the decisions in Rigby *v.* Connol and Chamberlain's Wharf Ltd. *v.* Smith warrant the contrary contention, and as the latter is a decision of the Court of Appeal, if it stands it is binding on us. But after the decision in Howden *v.* Yorkshire Miners' Association in the House of Lords, I think it is very difficult now to regard Chamberlain's Wharf Ltd. *v.* Smith,[2] in which a contrary view had been taken, as being good law. In Howden's case the plaintiff was allowed, in virtue of his proprietary interest in the funds of the union, to maintain an action to prevent their diversion to an unauthorized purpose. But if a member can get an injunction to prevent their going to an unauthorized person surely he may equally get an injunction to prevent his being excluded from all share in the benefit of them, and that is what would ultimately be the result of the proposed levies, if permitted to be made."

In Cope *v.* Crossingham,[3] the plaintiffs, the head trustees of a registered trade union, admittedly illegal apart from the 1871 Act, brought an action against the trustees of a branch claiming a declaration that a resolution, providing for secession and for distribution of the funds in its possession, was *ultra vires* of the branch; an injunction restraining the men trustees of the branch from dealing with the funds otherwise than in accordance with the society's rules; the removal of the trustees of the branch and the appointment of new trustees, and administration

[1] [1907] 1 K.B., p. 370. [2] [1900] 2. 605. [3] [1909] 2 Ch. 148

by the Court of the funds and property of the branch. It was unanimously held by the Court of Appeal,[1] affirming Eve J., that under the rules the plaintiffs had a sufficient interest in the property of the branch to maintain the action; that the intended distribution was *ultra vires* of the rules; and that the action, apart from the claim for administration, was not instituted with the object of directly enforcing an agreement within the meaning of section 4 of the 1871 Act; but it was held that the Court had no jurisdiction to make any order for payment, which would be an administration of the funds, though it would, if necessary, grant an injunction.

In Osborne *v.* Amalgamated Society of Railway Servants,[2] a member of a registered trade union who had been expelled by a resolution of the executive committee brought an action to obtain reinstatement on the ground that the resolution of expulsion was *ultra vires* and void, and he claimed an injunction restraining the defendants, their officers, agents or servants, from acting upon or enforcing the resolution or such part of it as referred to his expulsion. It was held unanimously by the Court of Appeal,[3] reversing Warrington J., that the action was not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the union "to provide benefits to members," and that the action was therefore maintainable.

The view that a member may restrain a union

[1] Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ. [2] [1911] 1 Ch. 540. [3] Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.

from wrongfully expelling him and that such an action is not a direct enforcement was followed in Parr *v.* Lancashire and Cheshire Miners' Federation[1] and also in Kelly *v.* National Society of Operative Printers Assistants,[2] though in the latter case damages were expressly refused.

It will be remembered how the opinion of Mr. Justice Phillimore, expressed in Steele's case, Chamberlain's Wharf *v.* Smith, where the Court refused to restrain a union from expelling on the ground that it was a direct enforcement of his rights, was followed in Howden's case. This view as to the doubtfulness of Chamberlain's case has certainly been urged in England since that time, but in Scotland, in the case of Smith *v.* The Scottish Typographical Association,[3] Chamberlain's Wharf was followed, and an injunction and declaration concerning the expulsion of a member was refused. So also was Chamberlain's Wharf followed in Rae *v.* Plate Glass Merchants' Association,[4] where, however, the claim to expel was covered by some subsection other than subsection (3) which contemplates a limited kind of agreement, i.e., for damages being enforced. Thus, where the question of expulsion is under s. 4 (1), the dispute being how members should be employed, or under s. 4 (4), an agreement between one trade union and another, the Courts have held that they have no jurisdiction to restrain an expulsion (Braithwaite *v.* Amalgamated Society of

[1] (1913) 1 Ch. 366. [2] 84 L.J., Ch. p. 2236.
[3] (1919) S.L.R., p. 46.
[4] (1919) S.L.R., pp. 56 and 315.

Carpenters and Joiners[1]; McKusky *v.* Cole[2]) —and in this way Chamberlain's Wharf *v.* Smith, which also turned upon section 4 (1), is perhaps reconcilable with the decision under section 4 (3).

The final conclusion as to the Courts' jurisdiction is, therefore, a matter of considerable doubt. It is clear that a claim for damages is a direct enforcement and it is also clear under section 4 (3) that an injunction to restrain members from applying the funds of the union in a manner inconsistent with the rules is maintainable, but as regards an injunction restraining the union expelling a member the Courts consider an action to be maintainable where the dispute is under section 4 (3), but not when it falls under any other subject matter discussed in section 4. It is difficult to see how, in any event, a bare declaration can be a direct enforcement. In Chamberlain's Wharf, no declaration was sought but only injunction and damages.

The whole question must depend on how far the proceeding is for the object of interfering with the administration of funds or benefits.

§ 3.—Common Law Legality.

There remains the question as to the legality of the trade union. If the trade union be lawful at common law and an action to enforce benefit within section 4 be desired to be brought, it would appear, since the speeches of Lords Loreburn and

[1] (1921) Per Eve J. L. J. Newspaper, 26 March. [2] (April, 1921) Per Peterson J., unreported.

Atkinson, that such an action should not be brought against the trustees whose rights to be sued depend upon the 1871 Act, but in a representative action; this point, however, is one of procedure rather than one of substance. The authorities are clear that where the union is lawful the action may proceed, and this preliminary point, as to whether the union is so lawful, since the case of Swaine *v.* Wilson, has often occupied the attention of the Courts.

In Swaine *v.* Wilson and Others,[1] it was held unanimously by the Court of Appeal[2] that, in fact, none of the rules of the defendant society (which does not appear to have been registered) were illegal as being in restraint of trade; that the society was consequently legal at common law, and that the action was one which the Court could entertain at common law apart altogether from the Trade Union Act, 1871; and it was held that, where the general objects of the society are legal, the fact that some of its rules may be illegal as being in restraint of trade does not render it illegal, nor does the fact prevent a member from recovering a sum of money payable to him under a rule of the society which is not illegal.

In Old *v.* Robson,[3] the respondent made a claim under the rules of a society, which was a registered trade union, to recover a sick benefit relief. He contended that, under the Friendly Societies Act, 1875, s. 22 (a) this was a friendly society. It was held by the Divisional Court,[4] reversing the magi-

[1] (1890) 24 Q.B.D. 252. [2] Lord Esher, M.R., Lindley and Lopes, L.JJ. [3] (1890) 62 L.T. 282. [4] Pollock, B., and Wills, J.

strates decision, that the objects of the society's rules were illegal, as being in restraint of trade, that the society was therefore illegal at common law, and that consequently the Court had no jurisdiction to entertain the action. Pollock, B., observed that the question was whether the society was a trade union or substantially a friendly society. He said,[1] "We have a society which at common law would clearly have been illegal." In referring to the rules, so far as they related to trade matters, the learned Baron observed that there were powers of fine, of suspension, and even of expulsion of members for violating the rules of the society with reference to these trade questions. He held that at common law the rules were illegal and that any action concerning their breach could not be entertained by the Court. Baron Pollock concluded in these words: "In the case of Knowles *v.* Booth,[2] there was no suggestion that the society in question was an illegal society, so that the decision in that case is no authority whatever for supporting the decision of the magistrates in this case." Wills J. observed:[3] "It seems to me that it is immaterial whether this society is a trade union or not; the only question is, whether it is an illegal association at common law. If so, it remains so as to this purpose." The Court was already of opinion that the society was illegal at common law. Commenting upon the rules, he observes: "There are various provisions, the objects of which are in restraint of trade. A man shall not carry on his

[1] (1890) 62 L.T., p. 283. [2] (1884) 32 W.R. 432. [3] (1890) 62 L.T., p. 284.

trade as he likes, but must look to the governance of his society. It is clear, therefore, that the society is illegal at common law, and that the incapacity to appear in Court has not been removed by any legislation. The case of Knowles *v.* Booth,[1] applies to what is a friendly society and no more. 'It will not do to say that the society is a legal society for some purposes, but illegal for other purposes."

The case of Swaine *v.* Wilson was not cited before the Court at all, but it cannot be suggested that there is any real analogy between the case and the case of Old *v.* Robson. In Swaine *v.* Wilson the Court held that none of the rules were illegal. It is true that there were *obiter dicta* which laid down the further doctrine that, if the object of a society was legal, the introduction of some objectionable rules would, at most, merely render such particular rules invalid. But there is nothing inconsistent with this doctrine in Old *v.* Robson. Mr. Justice Wills's expression "that it will not do to say that the society is legal for some purposes, but illegal for others," is not inconsistent when it is remembered that the Court was of opinion that the main object of the society was illegal.

In Sayer *v.* Amalgamated Society of Carpenters and Joiners,[2] the plaintiff brought an action against a registered society, which was likewise defendant in Old *v.* Robson, to recover benefits. Both Swaine *v.* Wilson and Old *v.* Robson were brought before the notice of the Court. In holding that he had no jurisdiction to entertain the action, Mr.

[1] (1884) 32 W.R. 432. [2] (1903) 19 T.L.R., 122.

Justice Bruce observed that it was quite clear that the objects of the society were in restraint of trade and to maintain strikes. These were now legal objects if carried out in a legal way, but they were not objects as to which agreements concerning them could be enforced by the Court. The authority of Old *v.* Robson was binding upon him, and it was decided upon the rules of this very society, one of the main objects of which was to promote the organization of trade, though some of the rules had the objects of a friendly society. Although in Swaine *v.* Wilson it was decided that the rules were not in restraint of trade, he thought that the dictum of Lord Esher did not apply in this case. This was primarily a society for the organization of trade, and the rules dealing with the objects of a friendly society were a small part of the whole.

In Cullen *v.* Elwin and Others,[1] the plaintiff brought an action to recover arrears of superannuation allowance. The Court of Appeal[2] affirming the judgment of the Divisional Court, held that the main purpose of the defendant society, as appearing from the rules, was illegal, that all the other rules were ancillary to and inseparable from those in restraint of trade, and the association was therefore illegal. In Old v. Robson, the Court, upon reviewing the rules of the society came to the opposite conclusion. "In the present instance the question that we have to consider is on which side of the line does this case fall. In Swaine *v.* Wilson

[1] (1904) 90 L.T. 840. [2] Collins, M.R., Romer and Mathew, L.JJ.

the society purported to be a friendly society. I do not say that would be conclusive, but the society purported to be a friendly society and not a trade union, and the greater number of the rules, on the fact of them, were obviously fit rules for carrying out the purposes of a friendly society." The Master of the Rolls, after referring to the rules, continued: "It seems to me that it is perfectly impossible to say that the primary object of this society is not 'trade protection' as they call it, by the ordinary means employed by trade unions, viz., strikes and so on, which at common law are illegal. That is the main purpose of the society, and all these other provisions (in the rules) are ancillary to it." Mathews L.J. had no doubt that this was not a friendly society. The friendly part was only ancillary to the trade union part, and the condition and consideration for granting a superannuation allowance was that the applicant should belong from the first to the trade union. The society had power at any moment to terminate the membership and expel him for interfering with its main objects. Romer L.J. concurred.

In Burke *v.* Amalgamated Society of Dyers,[1] the plaintiff, a lunatic's widow, sued a registered trade union for sick benefits alleged to be due to her husband at the date of his death. The Divisional Court[2] held that the main object of the society was illegal, that the legal and illegal portions of the rules were inseparable, and that consequently the Court could not entertain the action.

[1] [1906] 2 K.B. 583. [2] Kennedy and A. T. Lawrence, JJ.

In Gozney *v.* Bristol Trade and Provident Society,[1] the plaintiff brought an action against a registered trade union for a declaration as to the construction of some of its rules, which referred to penalties imposed on sick members for being out after hours. He also claimed a declaration that he was right in carrying out the directions of his doctor, and that the defendants were wrong in fining him for so doing, and he claimed for the return of the amount he had been fined. It was unanimously held by the Court of Appeal,[2] reversing the Divisional Court, that the society was legal, that its rules were unobjectionable, and that, even assuming that they were not, the formation and application of the trade funds was distinct and severable from that of the friendly society funds. In commenting upon the rules of the defendant society, Lord Cozens-Hardy said[3] that there was nothing in the rules which authorized calling out members or assisting a strike. Indeed, any such action was expressly prohibited by the rules. He thought that the society was really a mutual insurance society against sickness and loss of wages by reason of shortness of work (called travelling relief), or by reason of voluntary abstention from work (called strike pay). His Lordship concluded: "It is a harmless society, and there is nothing unlawful in its objects. The judgment of this Court in Swaine *v.* Wilson applies to the present case. I think this society is just inside the limits of legality."

[1] [1909] 1 K.B. 901. [2] Cozens-Hardy, M.R., Fletcher Moulton and Buckley L.JJ. [3] *Ibid.*, p. 916.

In Russell *v.* Amalgamated Society of Carpenters and Joiners and Others,[1] an action was brought by a widow, as personal representative of her husband, who had been a member of a registered trade union, against the society and the trustees of its funds, claiming sums alleged to be due under the rules providing sick and superannuation benefits for the society's members. It was held unanimously by the House of Lords that the main object of the society was illegal at common law as being in restraint of trade, and that the rules relating to its provident purposes were so inseparably connected with that object as to be affected by its illegality, and were therefore unenforceable; and consequently the plaintiff's action to recover benefits was unenforceable.

In Mudd *v.* General Union of Operative Carpenters and Joiners,[2] it was held that, on the construction of the defendant society's rules, it was an illegal association at common law as being in restraint of trade. Coleridge J. said[3]: "If the matter was *res integra* it might be urged that the law should take cognizance of all innocent rules of a trade union, but decline to recognize such rules as are framed for an illegal purpose. But it has been held in Russell *v.* Amalgamated Society of Carpenters and Joiners, that if the objects of the trade union are in any substantial sense illegal, the whole trade union is an illegal association, and none of its rules can be enforced. On the other hand, if the objects of

[1] [1911] A.C., p. 506. [2] (1910) 26 T.L.R. 518. [3] [1910] 26 T.L.R., p. 519.

the trade union be in the main legal the fact of the existence of a rule or rules which disclose an illegal purpose, if such rule or rules are not in regard to a main object of the society, will not make the whole society illegal." His Lordship thought that the rule dealing with misconduct and consequent expulsion of members was similar to that in Russell's case, in which it was held that such a rule contemplated such a restraint of trade as to make all the other rules generally, harmless or otherwise, unenforceable at law. "This decision," he concluded, "was grounded on the consideration that there was so strong a persuasion on the members to obey the rules, even contrary to their inclination, through fear of losing the benefits, as to make the rule a rule in restraint of trade, and that, being a dominant rule, it made all the other rules unenforceable." His Lordship thought it must be clearly shown that the rules having an illegal tendency were a main feature of the trade union before they could render unenforceable the harmless rules.

In Osborne *v.* Amalgamated Society of Railway Servants[1] the plaintiff brought an action against a registered society, from which he had been expelled, claiming to be reinstated. On the preliminary objection that the defendant society was an illegal association at common law, and that its domestic agreements were therefore unenforceable, being taken, the Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Buckley L.JJ.), reversing the decision of Warrington J.,[2]

[1] [1911] 1 Ch. 540. [2] [1911] 27 T.L.R. 115.

held that on construction the rules were not illegal as being in restraint of trade, that the society was therefore an association lawful at common law, and that the action was consequently maintainable. Lord Cozens-Hardy, after remarking that there was nothing in the objects of the society, as appearing from the rules, which suggested illegality, observed[1]: "But, though the objects are free from the taint of illegality, there may be provisions in the rules which seek to advance the objects by unlawful means. It is remarkable that there is no provision, such as is very often found in rules of trade unions, for calling out members in the event of a strike." His Lordship said that illegality must be established upon some plain provisions in the rules, and he could find no such provision.[2] He further observed that the executive committee of the society could only sanction, as distinct from ordering, a strike, and that the rules contained careful provisions to secure legality.[3]

Fletcher Moulton L.J., after stating that the onus of establishing the allegation of illegality rested on the party relying on it,[4] stated that the familiar provisions relating to strikes and the power of the society to direct whether men shall or shall not work under particular circumstances, were absent.[5] He declared that the Courts would not hold an association to be illegal at common law unless it clearly appeared from the rules that its objects were in restraint of trade to an unreasonable extent. He thought that the rules

[1] [1911] 1 Ch., p. 551. [2] [1911] 1 Ch., p. 553. [3] *Ibid.*, p. 551. [4] *Ibid.*, p. 556. [5] *Ibid.*, p. 564.

contained no provision in restraint of trade such as would render this association illegal at common law.[1] Buckley L.J. was of opinion that, the rules did not provide that when a strike, or, as the rules called it, a trade movement, was sanctioned by the executive committee, every member was bound to strike, nor was such member, if he had struck, bound not to resume work without the executive committee's sanction.[2] His Lordship concluded[3]: "A society is not to be found illegal by reason of difficulties in interpreting the rules, but by finding in sufficiently plain language that there are in the rules provisions so in restraint of trade as to render the society illegal at common law. Those rules do not, I think, contain anything plain in that direction, and upon this ground I am disposed to think that this society is not illegal."

The question to which one is driven is that in the words of Lord Justice Vaughan Williams in Russell *v.* Amalgamated Society of Carpenters and Joiners,[4] the illegality is not to be presumed, but must be established by those who rely upon it. Where the principal object of the union is such that a member can wholly avail himself of it without bringing into operation such of its purposes as are in restraint of trade, it is unlawful at common law, but, where the objects are separable the main objects of the association may not be necessary unlawful. The fact that disobedience of the unlawful rules causes forfeiture of all proprietory interests is a sign of illegality. The matter

[1] *Ibid.*, p. 565. [2] *Ibid.*, pp. 571 and 572. [3] *Ibid.*, p. 572. [4] [1910] 1 K.B. 506.

really depends, in the last resort, upon the rules of the particular organization in question, but since Osborne's case in the Court of Appeal it is clear that the mere provision of strike rules will not in itself necessarily make the society an unlawful one at common law.

We have considered the interpretation which has been placed upon the words of section 4, apart altogether from subsection 3 thereof. Thus, among the agreements which have been held to be unenforceable are those between members of a union as to how they should transact business. This term includes rules binding members not to charge less than certain rates or to deal with non-members,[1] also agreements on which members shall employ or not be employed,[2] and an agreement between one trade union and another.[3] In these cases it has been held, the word "directly," though governing the whole section, has no application, at any rate where an injunction is claimed.

An agreement by a member to repay money received as a benefit comes within the section.[4] The provision of benefits to members has been held in England not to include an indemnity by the union to pay the law costs of the member (Lees *v.* The Lancashire Miners' Association),[5] and also in Scotland.[6] The cases raising the question as to how far the representative of a deceased member may him-

[1] Chamberlains' Wharf Ltd. *v.* Smith [1900], 2 Ch. 605. [2] Mullet *v.* The United French Polishers' Society [1904] 20 T.L.R. 595. Braithwaite *v.* Amalgamated Society of Carpenters and Joiners [1921]. [3] Cole *v.* McKusky [1921]. [4] Baker *v.* Ingall [1912] 3 K.B. 106. [5] 106, *Times*, June 20th. [6] Mackendick *v.* National Union of Dock Labourers (1910) 48 S.L.R. 17.

self be regarded as a member, are not easy to reconcile. In Burke *v.* Society of Dyers,[1] a widow of a deceased member was held to be so far a member that she came within section 4 and could not sue, but in Love *v.* Amalgamated Society of Dyers,[2] it was held that the widow was not a member and could sue.

There remain to be considered those principles which deal with the internal administration of a trade union. The legality of trade union contracts generally, which do not come within Section 4, will enable the Court to prevent improper application of the funds or improper administration. Thus the contract of membership and the rights arising out of it may give rise to enforceable proceedings if such proceedings do not come within Section 4 as in the case of Osborne *v.* Amalgamated Society of Railway Servants,[3] see also Dennaby Main Collieries *v.* Yorkshire Miners' Association.[4] The Courts have considered whether in certain circumstances the rules authorizing strike pay are lawful.[5] They may establish the right of persons to inspect books by an accountant,[6] or inquire into the proportions of distributions of funds, discretion,[7] and they have adjudicated in the question as to the legality of the expulsion of an executive committee,[8] also they have considered the legality of investments by a trade union executive in a com-

[1] [1906] 2 K.B. 583. [2] [1906] 2 K.B. 583. [3] [1911[1 Ch. 540. [4] [1906] A.C. 384. [5] *Re* the Durham Miners' Association, Watson *v.* Cann (17 T.L.R. 39). [6] Norrey *v.* Keep [1909], 1 Ch. 561. [7] *Re* the Printers and Transferers Amalgamated Trades Production Society [1899], 2 Ch.D. 184. [8] A.S.E. and Others *v.* Jones and Others (29 T.L.R. 484).

pany.[1] For in M'Dowelly's case, it was said by Lord Culle, p. 240, trust funds do not entitle executive committees to do with them what they please.

Finally, in connection with actions concerning the expulsion of members from their membership, the general rule as to natural justice and the particular constitution of each union will be considered by the Court,[2] and such cases will follow the usual principles which obtain in cases of clubs such as Labouchere *v.* The Earl of Wharncliffe,[3] and to take a recent decision, Young Ladies' Imperial Club.[4]

It will be seen therefore that, apart from section 4 and the question of restraint of trade so far as contract is concerned, a trade union is in much the same position as any other unincorporated association.

§ 4.—CONCLUSION.

Our task is now completed. The day may come when the whole law regarding trade unions may be reconsidered or codified. Meanwhile we have to note the abnormal legal development of these institutions. Fifty years ago it was well nigh impossible for a trade union to sue, either in contract or in tort; to-day it is almost equally difficult to sue the trade union. In either case the position is an anomalous one.

[1] Carter *v.* United Society of Boilermakers (60 S.J. 44); Bennett *v.* National Amalgamated Society of House and Ship Painters (31 T.L.R. 203); M'Dowelly *v.* M'Glee [1913] 2 S.L.R. 238. [2] See Burns *v.* National Amalgamated Labourers' Union [1920], Ch.D. 364. [3] (1879) 13 Ch.D. 346. [4] [1920] 36 T.L.R. 392.

ADDENDUM TO LECTURE IV.—At the time of publication, the Court of Appeal in Braithwaite v. Amalgamated Society of Carpenters and Joiners reversed the decision of Eve J. that the Court had no jurisdiction to grant an injunction to restrain the expulsion of a member of a Trade Union, where the subject matter of the dispute was how he should be employed.—See Trade Union Act, 1871, s. 4 (2).

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